Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

ISAAC MCCREARY,

v.

ROBERT HOKE, as Superintendent of the Eastern Correctional Facility, and ELIOT SPITZER, as Attorney General of the State of New York,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a denial of a first application for a certificate of appealability ("COA") under 28 U.S.C. § 2253, must be accompanied by a written opinion providing "an overview of the claims in the habeas petition and a general assessment of their merits" (*Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1038 (2003)), particularly when the habeas corpus petition was not denied on procedural default grounds and the issues sought to be appealed have significant surface merit, such as when the district court found a pervasive constitutional error to have occurred at the trial but merely deemed it harmless, or when the petition demonstrated that the state court had provided a blatantly incorrect definition of "guilt beyond a reasonable doubt."

II. Whether the denial of a COA without explanation in a written opinion violates 28 U.S.C. § 2253 as interpreted by *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029 (2003).

III. Whether a COA under 28 U.S.C. § 2253 can be denied when the district court found that pervasive violations of the habeas petitioner's constitutional right to confrontation occurred throughout the underlying state court criminal trial and denied the petition only on a finding of harmless error.

IV. Whether a COA under 28 U.S.C. § 2253 can be denied in a case where the jury in the underlying state criminal trial was instructed that in order for them to have a "reasonable doubt" concerning the defendant's guilt sufficient to render a not guilty verdict, they had to have a "really serious" doubt as to his guilt.

V. Whether each of the five issues identified by petitioner to the court of appeals warrant a COA pursuant to 28 U.S.C. § 2253, and whether petitioner is ultimately entitled to habeas corpus relief.

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OPINIONS BELOW

Petitioner's 1993 New York State conviction was affirmed on direct appeal (*People v. McCreary*, 253 A.D.2d 894 (2d Dep't 1998), *leave to appeal denied* 92 N.Y.2d 1035 (1998)), following which petitioner timely sought federal habeas corpus relief.

Upon a June 18, 2002 Magistrate Judge's Report and Recommendation that the petition be denied (Appendix 34a), by Memorandum and Order of April 16, 2003 and Judgment of April 17, 2003, the district court for the Eastern District of New York (Hurley, J) denied petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Appendix 3a). The Unites States Court of Appeals thereafter denied petitioner's timely application for a certificate of appealability pursuant to 28 U.S.C. § 2253 on October 31, 2003 (Appendix 2a). Petitioner's timely combined motion for rehearing and rehearing *en banc* was denied by the court of appeals on June 1, 2004 (Appendix 1a).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

U.S. CONST AMEND VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by

a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT

Essentially without opinion, the Second Circuit Court of Appeals denied a "certificate of appealability" to petitioner, a state prisoner who timely filed a federal petition for habeas corpus (*see* order dated October 31, 2003, Appendix 2a). The Petitioner--the young son of a clergyman, sentenced to serve 25 years to life imprisonment upon his conviction for a non-intentional "depraved indifference" murder and related offenses--was precluded from appealing even though the district court had concluded that a pervasive Confrontation Clause violation had occurred during petitioner's homicide trial but merely deemed the pervasive constitutional violation to have been harmless. By the court of appeals' order, petitioner was also precluded from appealing the affirmance of his homicide conviction notwithstanding a flagrantly erroneous reasonable doubt charge, which astoundingly prohibited the jury from acquitting petitioner unless they had a "really serious" doubt that he might not be guilty. The Court of Appeals thereafter denied petitioner's combined motion for rehearing and rehearing *en banc* (*see* order dated June 1, 2004, Appendix 1a).

As demonstrated below, there continues to be a genuine need for guidance from this Court to the courts of appeal and district courts concerning the extremely limited role and jurisdiction they have in relation to certificates of appealability to habeas petitioners under 28 U.S.C. § 2253. A short-form order which does not even mention the issues sought to be appealed, let alone explain why they are deemed so lacking in merit that they will not even be let in the appellate door, should not suffice, particularly when it renders review by this Court difficult at best.

Secondly, in light of the serious issues sought to be appealed, the continued involvement of this Court is necessary as a matter of exceptional and ongoing public importance, and to safeguard the federal writ of habeas corpus. Specifically, the appeal implicates the following questions: (1) when the district court finds a Confrontation Clause error to have occurred throughout the trial, and when this Court has held that such constitutional error can be "enormously damaging", whether a denial of a COA is as a matter of law prohibited; (2) when a habeas petition shows that a blatantly erroneous definition of "reasonable doubt" was provided to the jury, whether a denial of a COA is prohibited as a matter of law; and (3) whether a reasonable doubt charge which wrongly defines "reasonable doubt" as a "*really serious*" doubt, i.e. the charge prohibited an acquittal unless the jury had a "*really serious*" doubt concerning petitioner's guilt, can withstand habeas scrutiny.

Factual Background

Petitioner, Isaac McCreary, a young man with no prior criminal convictions, was convicted of an accidental shooting under New York's "depraved indifference murder" statute and other crimes.[1] He was charged with pointing a pistol at a man who had

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[1]Petitioner was convicted principally of depraved indifference murder after he allegedly went to the home of a man who had previously

sexually abused Isaac's girlfriend, demanding that the man repay the girlfriend money he had borrowed, and for emphasis, cocking the pistol. It was claimed that the pistol went off once and shot the man dead. The only persons whom the prosecutor claimed were in the house and witnessed the shooting were petitioner and his brother. Aside from evidence concerning the actions of petitioner and his brother in entering into the house, and their actions after the death, the prosecution's evidence consisted of the petitioner's confession. The reliability of the confession was seriously called into question by the trial evidence, which included that the interrogation was conducted after petitioner had been awake the entire night and the entire following morning; that Miranda warnings purportedly administered were incomplete; and most importantly, that detectives led petitioner to believe that if he did not confess his sister and his girlfriend would both be arrested. *See* summary of the evidence provided in note 4, *infra*.

The trial was punctuated throughout with blatant Confrontation Clause violations, which even the district court below found to have occurred. U.S. Const Amend VI. The prosecutor incessantly introduced evidence that petitioner's brother and sister had told police "everything" and that therefore petitioner should confess to the shooting. This error which the district court found, which directly and wrongly "confirmed" for the jury the reliability of the prosecution's central piece of evidence, petitioner's confession, was deemed harmless constitutional error.

Among other significant errors in the reasonable doubt

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sexually abused petitioner's girlfriend, demanded that the man repay the girlfriend money he owed her, and pointed a cocked pistol at him. Testimony at trial established that a cocked pistol will inadvertantly fire with even a few pounds of pressure on the trigger. The entry into the home and the demand for repayment of the loan were also charged as burglary and robbery, and because of the accidental death, as separate felony murders, concerning which petitioner was also convicted.

charge, the trial judge defined "reasonable doubt" as a doubt which is a "really serious" doubt. Without even attempting to explain how this direct definition of what a reasonable doubt is, could have been taken to mean anything other than requiring a "really serious" or weighty doubt, the district court ruled that on the whole the reasonable doubt charge was proper.

The trial judge denied the petitioner's motion for reassignment of counsel, and did not bother to ask petitioner if he was continuing his previous *pro se* status. The district court deemed these not to constitute error.

The trial judge provided a jury instruction which was erroneous as to each and every count in the indictment, going to the very heart of the petitioner's culpability. The district court claimed the errors were either harmless or were not errors.

The district court also ruled that petitioner was provided with effective assistance of counsel notwithstanding serious and devastating errors of the trial attorney, including failing to object to the pervasive confrontation violations (U.S. CONST AMEND VI) and failing to object to the incredibly erroneous and prejudicial reasonable doubt charge.

Petitioner filed a timely application to the court of appeals for a certificate of appealability. By order dated October 31, 2003 the court of appeals denied the COA without explanation. Petitioner then timely sought a rehearing and *en banc* rehearing before the court of appeals. By order dated June 1, 2004 the combined rehearing motion was denied.

REASONS FOR GRANTING THE WRIT

A. Under the circumstances presented, a denial of a COA should be accompanied by a written opinion providing "*an overview of the claims in the habeas petition and a general assessment of their merits*"

This Court's ruling in *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1038 (2003), has altered the benchmark against which a request for a certificate of appealability (COA) is determined. Issues which are not procedurally barred can no longer be dismissed at the COA stage if they are at least "debatable." *Id.* But the question remains: given the extremely limited scope of review at the COA stage, and therefore the expectation that only rarely will a non-*pro se* appeal be deemed not to even raise a "debatable" issue for appeal, should a court's denial of a COA be supported by an explanation as to why each of the identified issues does not even raise a cognizable question worthy of appeal?

This question was presaged by last years' *Miller-El* opinion itself, where this Court held that "*The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits*." *Id.* at 336 (emphasis supplied). A mere "motion for COA denied" order simply does not reflect the necessary "overview of the claims" or the required "general assessment of their merits."

28 U.S.C. § 2253 provides that a state prisoner whose petition for a writ of habeas corpus has been denied must obtain a Certificate of Appealability from either the district court or the circuit court. This "gatekeeping" statute imposes a minimal meritoriousness requirement, and is aimed at precluding mainly truly frivolous claims or claims which do not even raise a debatable claim that the habeas petition should have been granted. This Court in *Miller-El v. Cockrell, supra*, 537 U.S. 322, 123 S.Ct. 1029,

1038 (2003), explicitly held that a COA must be granted every time *"reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"* Moreover, *"a COA does not require a showing that the appeal will succeed"* and *"a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief."* *Id.*

Thus, given the extremely limited purpose of a COA determination, the fact that a COA cannot be denied when it is at least "debatable" that the district court erred, and the obligation of the court determining the motion to conduct *"an overview of the claims in the habeas petition and a general assessment of their merits"* (*Miller-El, supra*, 537 U.S. at 336), some kind of analysis of the issues sought to be appealed should be provided in the form of a written opinion. There are habeas petitions which are procedurally barred or which clearly fail to raise a "substantial" constitutional question. But on a petition such as this, where it was denied by the district court not because of a procedural default, and where the denial of the petition is based on plainly and inherently debatable grounds such as harmless error and the like, some sort of reasoning for the denial of a COA is clearly called for.

Admittedly, a court of appeals is free to decide matters "without opinion." But that is a function of its appellate role–passing on matters which have already been passed upon by the district court upon a full record. Unlike appeals, however, a COA determination is generally first made by the court of appeals.[2] As pointed out in *Miller-El*, the analysis at the COA stage is

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[2]The district court here did not provide an analysis of whether any of the claims are deserving of a certificate of appealability. The district court merely tacked on to the final paragraph of its opinion denying the petition that a COA is denied. Indeed, the question of whether a COA should issue was never even raised before the district court.

qualitatively different than the analysis of the merits. A full merits analysis may be provided in the district court's opinion, but the issue of "debatab[ility]" is only first presented at the COA stage. Thus, if a COA is denied in the manner in which it was here, that is, the motion for a COA is simply denied without explanation as to the proposed issues, there is in fact not even a single opinion providing the bases for the COA denial.

This Court may find such an outcome intolerable. First, it renders review by this Court extremely difficult. Instead of reviewing whether the specific basis for the denial was incorrect, this Court would have to assume that the court of appeals applied the correct standards.[3] Moreover, without the benefit of even one full analysis of the debatability of the issues below, this Court would be cast in the role of essentially the first decisionmaker, having nothing with which to agree or disagree, other than the lower court's ultimate ruling to deny a COA.

There is also the significant matter of appearances. When there is not even a single opinion analyzing matters of pivotal interest to a state prisoner, it is difficult not feel as though the issues were not analyzed in the appropriate depth. Other than the handful of cases which this Court is able to hear, a denial of a COA means the termination of years of federal habeas review. It also means that the court of appeals concluded the petition does not even raise a debatable question. After counsel and the parties have spent years and extensive efforts exhausting state appeals, and then spent years waiting for the habeas petition to be first passed upon by the district

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[3]Indeed, here, as petitioner argued to the court of appeals in his motion for rehearing, at the time the COA was denied the Second Circuit had never cited the *Miller-El* decision in relation to the manner in which to assess a motion for a COA, and the bare order denying a COA made no mention of the "debatable" standard. It is in fact questionable that the court of appeals applied the lenient "debatable" standard, given the serious and well developed constitutional issues raised in the petition.

court, to have an appellate court declare without explanation that there is not even a debatable question presented, quite understandably leaves an appearance that the COA application was given short-shrift by the appellate court.

All of this warrant's this Court's further attention. In order to accord its ruling in *Miller-El* any teeth, it may be necessary that the lower courts be directed to at least once analyze in a written opinion each issue for which a COA is sought, or at least each issue which was not rejected as procedurally barred. This should particularly apply when, as here, a constitutional violation was found to have occurred (see discussion below of the pervasive Confrontation Clause violations which the district court found), or where the jury was provided with a blatantly incorrect definition of "guilt beyond a reasonable doubt."

B. The issues sought to be appealed patently constitute issues deserving of review and deserving of habeas relief

Both the denial of the COA on the five identified issues and the ultimate denial of petitioner's petition for habeas corpus are deserving of review from this Court. Moreover, within several of the identified issues are central questions which this Court has yet to answer concerning limitations on when a COA may be denied, and when a habeas petition should be granted. Specifically these questions are: (1) when the district court finds a Confrontation Clause error to have occurred throughout the trial, and when this Court has held that such constitutional error can be "enormously damaging", whether a denial of a COA is as a matter of law prohibited; (2) when a habeas petition shows that a blatantly erroneous definition of "reasonable doubt" was provided to the jury, whether a denial of a COA is prohibited as a matter of law; and (3) whether a reasonable doubt charge which wrongly defines "reasonable doubt" as a "*really serious*" doubt, i.e. the charge

prohibited an acquittal unless the jury had a "*really serious*" doubt concerning petitioner's guilt, can withstand habeas scrutiny.

These and the remaining issues for which a certificate of appealability was sought scream for appellate attention, and easily meet the very minimal requirements of 28 U.S.C. § 2253 for issuance of a certificate of appealability, that "*reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'*" *Miller-El v. Cockrell, supra*, 537 U.S. 322 (2003) (reversing denial of COA).

The issues warranting review are:

(1) Confrontation Clause (Bruton) violation:

The District Court found there were repeated Confrontation Clause violations throughout the trial, which had the improper effect of confirming the believability of the defendant's confession (Appendix 14a-16a). U.S. CONST AMEND VI. Nevertheless, the District Court concluded that the error was harmless because the defendant had confessed (*id.* 16a-19a). In that the very harm caused by the repeated and pervasive Confrontation Clause violations was to support the prosecutor's contention that the defendant's confession was voluntary (he was led to believe his sister and girlfriend, in addition to his brother, had been arrested for the shooting and would be prosecuted if he did not confess), the finding of constitutional harmless error based almost entirely on the infected confession borders on the irrational and was certainly error warranting a COA and close appellate attention.

Facts: the state prosecutor and police witnesses violated petitioner's constitutional right to confront witnesses, by wrongfully and repeatedly disclosing to the jury that petitioner's sister, who did

not testify, and his brother, who was a non-testifying co-defendant and allegedly the only other person in the room at the time of the claimed accidental shooting, had already told police "everything that happened" and that therefore petitioner should confess to the accidental shooting (Trial Transcript [hereinafter "T:"] 618-620; 950; 959-960; 1005-1008; 1136-1141; 1385; 1401; 1601; 1609; 1635). References to these statements of non-testifying witnesses were emphasized from the beginning of trial to the end, and left the inescapable impression that petitioner's brother and sister had accused petitioner of the shooting, and that was why police told petitioner he should therefore confess. Some of the offending references are quoted in the district court's and the Magistrate's decision below (Appendix 71a-75a). The New York Appellate Division, Second Department, chose not to address this issue in its determination affirming the conviction on direct appeal, even in its amended decision following a motion to reargue. The district court, however, found the pervasive references to amount to clear Confrontation Clause violations, in that the jury was easily led to believe petitioner's brother and sister had accused petitioner of the accidental shooting. Yet the district court ruled that the confrontation violation was harmless, mainly because petitioner had purportedly confessed.

It is precisely because a confession of a non-testifying co-defendant (or others) can have the effect of "confirming" for the jury the validity of the defendant's confession, that this Court invalidated as violative of the Confrontation Clause the "interlocking confessions" exception which was at one time recognized by New York courts. *Cruz v. New York*, 481 U.S. 186, 192 (1987). Indeed, in *Cruz, supra*, this Court indicated that far from "harmless" as the district court held here, such error is "enormously damaging." *Id.* ("A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but <u>enormously damaging</u> if it confirms, in all essential respects, the defendant's

alleged confession" (emphasis supplied)). The exact same "enormously damaging" harm of "confirming" petitioner's confession can not be deemed harmless. There was major evidence presented to the jury at trial, and highlighted on the direct appeal in State court, and in this habeas proceeding, establishing that Isaac's confession was the result of undue pressure at the hands of the police, which included the fact that they led him to believe that his brother, his sister, and his girlfriend had all been arrested, and that if he did not take responsibility for the shooting, they too would be charged. This evidence, copied from the Memorandum of Law submitted in support of this federal habeas petition, which itself was taken almost word-for-word from petitioner's brief to the Appellate Division, is reproduced in the margin below.[4]

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[4]The statement purportedly made by petitioner was the prosecution's key piece of evidence and it suffered from several infirmities. Therefore, the lawyer's failure to object to the prosecution's linkage of petitioner's confession to his brother's, which had the effect of making it appear that Andrew's confession corroborated petitioner's, was highly prejudicial.

The evidence disclosed that when Detectives Towner and Brusa went to arrest petitioner at 8 o'clock in the morning (T:1129; 1325), he had already been awake since at least before mid-night (T:1198). Moreover, the detectives waited until Isaac McCreary finished a full shift at his job at around 12:30 in the afternoon before affecting the arrest (T:1326). Plainly, petitioner was already fatigued by the time the interrogation commenced.

In an unusual supposed oversight by the seasoned homicide detectives, there was no notation on the rights card which indicated petitioner had <u>understood</u> his rights to remain silent and to have an attorney present. While he signed the bottom of the card, no "yes" or initials were written near the warnings (T:1032). Furthermore, the portion of the card which petitioner did supposedly sign, made no direct mention of the right to remain silent--"Now that you understand, are you willing to answer any questions <u>before</u> talking with a lawyer or having one present." (T:958) (emphasis added). Thus, the failure of the officer to question petitioner as to whether he wanted to waive his right to remain silent (a fact a reasonable jury could conclude from the absence of a "yes" notation on the rights card near the warnings) was a persuasive reason for the jury to disregard the statement. *See* jury charge T:1694; CPL 60.45, and McKinney's Practice Commentary (by Peter Preiser) thereto.

Accompanying this was further factual recitation, also reproduced in the margin below, explaining why the remaining evidence was equivocal and could not have supported a conviction.[5]

The jury could further have concluded that petitioner signed the statement because police, intentionally or not, led him to believe that Jenny, Oliver, and even Evelyn would be charged if he did not accept responsibility. Detectives Blum and Lane testified that the defendant expressed concern for his relatives and Jenny, who were at the time in the homicide squad (T:980; 1375; 1390). There was also People's evidence which suggested petitioner may have been deceived into believing his girlfriend Jenny was under arrest (T:1138).

Furthermore, the alleged statement of the defendant at points was obviously written by the detective. The addendum passage of "I had no legal right to enter" was clearly not the kind of statement a laymen would make. Even if the jury decided to credit the confession in general, it could have discredited the addendum written in legalese which closely matched the trespass definition of burglary. Aside from the out of place addendum, there was a significant issue of fact raised by Jenny's testimony concerning whether petitioner had a legal right of entry, or reasonably believed he had that right. See her testimony at T:1278, indicating that she gave petitioner the key to Ramnath's apartment. See additionally the jury charge at T:1732, defining burglary in part as "knowingly enter[ing] unlawfully ... when he is aware that he has no license or privilege to enter or remain;" *People v. Basch*, 36 N.Y.2d 154, 159 (1975) ["a person who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass" or burglary].

[5]Although there were witnesses who testified as to circumstantial facts, the extent of their testimony was limited or they had clear motives to falsely testify. A conviction could not have been obtained upon their testimony alone. The testimony of Philip Riddick and Jenny Ramlakhan was inconclusive as to who committed the shooting. Riddick testified that he observed Isaac and his brother enter the decedent's house, heard a gunshot, and observed the brothers exit about a minute later (T:785-786). Jenny testified that Isaac and Andrew told her that they had gone to David's apartment, had gotten him to agree to return the money he owed her, and they left when they heard someone enter the apartment through the window (T:1246). She added that a few days later she pressed petitioner about the matter, and petitioner told her that it was "an Indian guy" who entered the apartment through the window (T:1255). Moreover, both Philip Riddick and

Exhaustion: the Confrontation Clause violation was fully presented to the State Appellate Division and the New York Court of Appeals in a leave application. The District Court concluded the claim was fully exhausted and timely presented in this federal habeas petition.

The claim is and was throughout also raised as constituting a deprivation of petitioner's constitutional right to the effective assistance of counsel, in that petitioner's attorney failed to object to the pervasive confrontation violation.

The government's opposition to the issuance of a COA upon this issue generally claimed that whatever error there had been was harmless. Yet no attempt was made to counter the compelling evidence tending to cast doubt upon the reliability of the petitioner's confession or the fact that none of the other witnesses accused petitioner of having been the shooter. Moreover, in denying the habeas petition the district court relied heavily upon petitioner's own confession, the one that was improperly "confirmed" by the wrongly introduced out-of-court statements, in finding the constitutional error harmless. See p. 14 of Judge Hurley's decision, Ex. C hereto ("*Petitioner confessed, both orally and in writing. This confession was made in conjunction with his identification of items from the crime scene and construction of a layout of the crime scene that correlated with the forensic evidence. No*

Jenny Ramlakhan testified that they did not observe any pistol (T:800; 1322).

While Carlos Guiness did observe a pistol, he had a clear motive to lie. He was on probation at the time he testified, was promised by the District Attorney's Office that he would not be prosecuted for the incident, was given $50 to testify, and Detective Blum offered to seek out an apartment for him (T:839-840). Moreover, Isaac's sister had been in a long-term relationship with Guiness and broke up with him. As she explained, his reaction to the breakup was "very violent" (T:1459), and he was arrested several times for being physically violent toward her (T:1459-1460). She also testified that Guiness habitually lied (T:1460).

attempt has been made, in conjunction with this proceeding,[6] *to challenge the voluntariness of these confessions*").

(2) Erroneous Reasonable Doubt Charge

Facts: Incredibly, the trial judge defined "reasonable doubt" to the jury as being a "**a really serious, well-founded** doubt." That is, the jury was explicitly told that a doubt as to guilt is not sufficient, and neither is even a "serious" doubt sufficient. Moreover, even the "well-founded" doubt charge improperly lessened the prosecution's burden of proof and wrongly tended to impose a burden of proof upon the defendant. The Appellate Division elected not to discuss this issue in its affirmance of the judgment of conviction. The district court herein found that the remainder of the reasonable doubt instruction correctly defined the legal standard and that in light of the entire charge the jury was not misled.

The district court did not address what possible meaning a jury could have given to the "really serious" doubt definition, other than that the doubt must be "really serious." Neither did the district court explain how such a flagrantly incorrect definition, when not explicitly withdrawn through a corrective instruction, can be deemed not to have been followed by the jury.

Importantly, the "**a really serious, well-founded** doubt" instruction was the very first definition given to the jury of what a reasonable doubt is, as opposed to what it is not, and therefore must have played a pre-eminent role in the jury's understanding of

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[6]As reflected in the exact quote from the memorandum of law submitted to the district court below in support of the petition, reproduced in footnotes 3 and 4 of pages 5-6 in the application for a COA submitted to this Court, Judge Hurley's assertion that no challenge to the voluntariness of these confessions was made on appeal or in conjunction with this habeas proceeding, is flagrantly erroneous.

the legal definition.

Moreover, as to the lower court's conclusion that the remaining charge correctly defined reasonable doubt, we point out that in fact other portions of the charge, specifically, the portion where the judge defined what a reasonable doubt is not, were also legally incorrect and even alone constitute a basis for invalidating the conviction. Going well beyond the usual, "It is [not a doubt] based on some guess or whim or speculation unrelated to the evidence" (N.Y. Crim. Jury Instr. §6.20), the trial judge imposed a clear over-emphasis upon what a reasonable doubt is not, thereby improperly dissuading the jury from finding a reasonable doubt, and did so using terms which clearly and wrongly imposed a burden on the defendant. The judge instructed:

> A groundless surmise or groundless suspicion is a foundless basis to support a reasonable doubt. A vague conjecture, a vague doubt, a capricious or speculative doubt, an arbitrary, imaginary or uncertain or mere possible doubt is not a reasonable doubt. (T:1700).

There is no requirement that a reasonable doubt be "[]certain." "An instruction that requires jurors to supply concrete reasons 'based upon the evidence' for their inclination to acquit implicitly imposes on defendants the burden of presenting a defense that supplies the jurors with the arguments they need to legitimize their votes." *People v. Antommarchi*, 80 N.Y.2d 247, 253 (1992). Similarly, a doubt founded on the evidence as a whole is always reasonable, even though it is often "vague." Moreover, it is not clear what the court meant by an "arbitrary" doubt. It would be rational, however, for a jury to interpret this as a prohibition against entertaining doubts they conjured up on their own, which the defense may have failed to call to their attention. Thus, read separately and in total, the court's reasonable doubt instruction, particularly its "really serious" doubt charge, directly lessened the prosecution's burden.

In *Cage v. Louisiana*, 498 U.S. 39 (1990) and *Victor v. Nebraska*, 511 U.S. 1 (1994), this Court debated over which of the dual meanings of "substantial doubt" a reasonable jury would have likely followed, and based on a careful analysis of the nuance with which the term was used, and its context, found it unacceptable in *Cage* and barely acceptable in the context of the charge in *Victor*. Here there is no room for honest debate over the meaning which a reasonable jury would have given to the term "a really serious" doubt–the term unquestionably means a heavily weighty doubt. To conclude otherwise is disingenuous.

Exhaustion: The Magistrate and District Court Judge did not reach the issue of exhaustion. The flagrantly erroneous reasonable doubt instruction, including the erroneous "really serious" term, "well-founded" term, and "vague" or "uncertain" doubt term, and other erroneous terms, were fully objected to before the Appellate Division, including in the context of a ineffective assistance of counsel claim.[7] Petitioner has shown in his memoranda below that this due process violation claim is directly reviewable as an error which, at the time the trial was held, did not require preservation in

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[7]By all accounts the issue was fully asserted in the context of a constitutional ineffective assistance of counsel claim. Moreover, in addition to the right to counsel claims, the petitioner's Appellate Division brief also argued that reversal of the convictions was warranted in that "it can not be said that the jury fairly deliberated over appellant's guilt or innocence" with respect to all of the erroneous jury instructions. The brief further contended that the erroneous instructions were so unfair that review "in the interest of justice" was necessary, and in some instances where state procedural rule allowed for it, the errors were claimed to be reviewable as a matter of law. All of this more than adequately raised the claim that review is necessary, notwithstanding the failure of the trial attorney to object, and that an affirmance of the conviction would constitute a fundamental miscarriage of justice. *See Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) [petitioner must have presented to state courts what is in "substance" the same claim]; *Picard v. Connor*, 404 U.S. 270, 278 (1971) [same]; *Galtieri v. Wainwright*, 582 F.2d 348, 353 (5th Cir. 1978); *see e.g. Wallace v. Duckworth*, 778 F.2d 1215, 1223 (7th Cir. 1985).

the trial court under New York preservation rules and therefore may be directly asserted on a habeas petition.[8] U.S. CONST AMEND XIV. Additionally, the error was clearly presented to the Appellate Division on direct review, is reviewable as part of petitioner's ineffective assistance of counsel claim, and is further directly reviewable as a due process clause violation under "cause and prejudice" analysis. The ineffectiveness of counsel in failing to object to any of the erroneous jury instructions constitutes "cause" for the default under the "cause and prejudice" exception of *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Neither the district court below nor the respondent have offered a single linguistic interpretation of "really serious" which does not mean a really weighty doubt. *See Cage v. Louisiana*, 498 U.S. 39 (1990). The district court's conclusion that this mistaken direct definition of what a reasonable doubt is, can be ameliorated by other portions of the trial judge's instruction here, is perplexing and warrants this Court's review. The requirement that reasonable doubt instructions are to be evaluated as a whole, should not mean that a judge's explicit use of a devastating definition will withstand scrutiny notwithstanding the certainty that the jury misunderstood the correct definition. The Second Circuit, applying this Court's precedents, has in fact sometimes held that a flagrantly wrong phrase, even when followed by an altogether correct and lengthy further reasonable doubt instruction, still requires a reversal of the conviction. *U.S. v. Doyle*, 130 F.3d 523 (2d Cir. 1996).

It is simply inconceivable that this sort of incredibly

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[8] *People v. Thomas*, 50 N.Y.2d 467, 472 (1980) (fundamental error in a jury charge, which explicitly shifts the burden of proof or "explicitly relieve[s] the People of their burden," is reviewable under N.Y. preservation rules as a matter of law without prior objection); *Smith v. Bordenkircher*, 718 F.2d 1273, 1275 (4th Cir. 1983) (objection to reasonable doubt instruction was not required under Virginia law and could be reviewed upon federal habeas application).

erroneous reasonable doubt instruction could not even form a non-frivolous basis for appeal, as the court of appeals effectively held. Moreover, on the merits, this Court's review is necessary to determine whether under *Cage v. Louisiana*, a direct and flagrantly incorrect definition of "reasonable doubt" can be ameliorated by other instructions which never purport to recant the erroneous definition.

(3) Erroneous jury instruction concerning each and every count in the indictment: The appeal brings up for review a jury charge which violated petitioner's right to due process (U.S. CONST AMEND XIV), in that the trial judge provided erroneous instructions as to each and every count in the indictment:

(a) In contravention of the well-settled rule of *People v. Gaines*, 74 N.Y.2d 358 (1989), the trial judge misdefined burglary, and felony murder with burglary as the underlying felony, by allowing a conviction based upon "unlawful remaining" when the entire theory of the case was "unlawful entry" (T:1732-1756).

(b) the jury charge contained a summary of the elements of robbery, and of felony murder with robbery as the underlying felony, which omitted the critical "forcible stealing" element (T:1743).

(c) the depraved indifference murder charge wrongly treated the offense as though it were an intentional murder charge. The court's instruction here was: you must find that "the Defendant shot Sudesh Ramnath with a handgun, thereby creating a grave risk of death...." (1709) (emphasis added). That is, the jury was told that if petitioner shot the gun, he created a grave risk of death and was therefore guilty. But the prosecutor had asserted that petitioner had accidently fired the gun and that his crime was in pointing it and cocking it back to scare the decedent (see especially Trial: 1647-1649; 1608; 1645-1646). Because there was no intentional

murder charge, the jury should have deliberated over whether the risks attendant and known to the defendant at the time he allegedly pointed a loaded pistol at the decedent, established the crime. *See People v. Register,* 60 N.Y.2d 270 (1983). Instead, the Court instructed the jury to look to the point where the shot was fired.

Given that each of these erroneous instructions, like the remaining issues, were fully presented upon petitioner's direct state appeal, and require a detailed analysis of the evidence to determine whether the erroneous instructions were harmless, which analysis was fully presented in petitioner's application for a COA, the issues were not amenable to summary rejection upon a COA application.

(4) Ineffective assistance of counsel: Whether petitioner was deprived of the effective assistance of counsel in this homicide trial which resulted in a sentence of imprisonment to the young man potentially for the remainder of his natural life, when incredibly, his attorney failed to sufficiently object when the prosecutor divulged through cross-examination that petitioner was being held in jail pending trial, failed to object when the arresting detective actually pulled out his own gun in front of the jury and demonstrated that his gun would not fire if cocked back and dropped to the floor, failed to object to the pervasive and incredibly damaging confrontation clause violations, failed to object to the erroneous jury charge concerning each and every count in the indictment, somehow did not object when the trial judge gave to the jury as his primary definition of what "reasonable doubt" is the requirement that they must actually find a "really serious doubt" and gave an otherwise clearly erroneous reasonable doubt instruction.

The deficiencies of the defense attorney are well documented upon this record, and clearly warranted a COA and appellate review.

(5) Wrongful failure to reassign counsel and failure to inquire concerning petitioner's continuing pro se status: Whether the trial judge wrongly refused to reassign counsel concerning whom petitioner had complained for months, and whether the court conducted a sufficient inquiry concerning the application, especially when counsel recounted a breakdown in communications and mistrust. Also, particularly in light of his reassignment application, whether the trial court's failure to ask petitioner whether he was continuing his pro se status for the trial, which he had invoked prior to a hearing wherein he represented himself, deprived petitioner of his constitutional right to self representation.

Analysis of this issue, fully presented in the state courts, the district court, and upon application for a COA in the court of appeals, clearly requires a significant review of the record to assess whether a breakdown in communications between the accused and his counsel required a reassignment *(United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972); *LaGrand v. Stewart*, 133 F.3d 1253, 1276 (9th Cir. 1998)), and whether the accused's wishes to proceed *pro se* were honored (*Faretta v. California*, 422 U.S. 806, 835 (1975)). Such is clearly an issue which cannot be decided at the COA stage without first hearing the actual appeal.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,
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United States Court of Appeals For The Second Circuit
Thurgood Marshall U.S. Court House 40 Foley Square
New York 10007

Roseann B, MacKechnie CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of June, two thousand four

McCreary.

Petitioner-Appellant,

v. Docket No. O3-2338

Hoke,

Respondent~Appellee.

A petition for rehearing panel rehearing and a petition for rehearing en bane having been filed herein by the appellant Isaac McCreary.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /S/
Arthur M. Heller
Senior Motions Attorney

99-CV-1288
Hurley, J.
Lindsay, Mag. J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 31st day of October two thousand and three,

Present:

Hon. Wilfred Feinberg,
Hon. Amalya L. Kearse,
Hon. Reena Raggi,
Circuit Judges.

Isaac McCreary,

Petitioner-Appellant,

v. 03-2338

Robert Hoke, Superintendent of Eastern Correctional Facility,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal dismissed because the appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

/s/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ISAAC MCCREARY,

Petitioner, **JUDGMENT**

against - CV-99-1288 (DRH)

ROBERT HOKE, as Superintendent of the Eastern Correctional Facility; ELIOT SPITZER, as Attorney General of the State of New York,

Respondent.

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A Memorandum and Order of Honorable Denis R. Hurley, United States District Judge, having been filed on April 16,2003, adopting, as modified, the Report and Recommendation of Magistrate Judge Arlene R. Lindsay, dated May 17, 2002, denying the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and denying a certificate of appealability, it is

ORDERED AND ADJUDGED that petitioner take nothing of respondent; that the petition for a writ of habeas corpus is denied; and that a certificate of appealability, is denied.

Dated: Long Island, New York
April 17, 2003

ROBERT C. HEINEMANN
CLERK OF THE COURT

By: /S/
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ISAAC MCCREARY, Petitioner,

against -

MEMORANDUM AND ORDER

CV-99-1288

ROBERT HOKE, as Superintendent of the (DRH) Eastern Correctional Facility; ELIOT SPITZER, as Attorney General of the State of New York,

Respondent.

----------X

APPEARANCES

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By: Edward Miller, Esq.

HURLEY, District Judge

I. Background

A. Procedural Background of the Habeas Petition

On March 8, 1999, this 28 U.S.C. § 2254 habeas corpus application was commenced by filing a petition. In connection with this petition, the Court issued an Order to Show Cause for the Respondent to answer. Thereafter, the petition was respectfully referred to Magistrate Judge Arlene R. Lindsay for a report and recommendation.

Judge Lindsay's Amended[1] Report and Recommendation was received by this Court on June 20, 2002. In the Report, Judge Lindsay's recommended the denial of Petitioner's application for a writ of habeas corpus. Petitioner filed timely objections to this Report.

B. Factual Background of the Underlying Conviction and Subsequent Appeals.[2]

On April 29, 1991 Petitioner drove to the apartment of Sudesh Ramnath ("Victim").

In the car with Petitioner were Phillip Riddick ("Riddick"), Carlos O'Neil Guiness ("Guiness") and Petitioner's brother, Andrew Oliver McCreary ("Andrew McCreary"). The express purpose of this visit was to scare Victim into repaying a debt owed to Petitioner's girlfriend, Jenny Ramlakhan ("Ramlakhan").

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[1]Judge Lindsay issued an original Report on May 17, 2002. However, in response to certain of Petitioner's objections, Judge Lindsay amended pages 26 and 27 of her Report. As Petitioner renewed his objections to this Amended Report, the Court only considers the amended version.

[2]These pretrial facts are discussed in greater detail in Judge Lindsay's thorough Report.

Petitioner and Guiness both proceeded to the Victim's apartment. After unlocking and prior to opening the victim's door, Guiness saw Petitioner pull out a gun. Upon seeing this Guiness returned to the car and relayed his observations Riddick and Andrew McCreary.

After hearing this information, Andrew McCreary exited the car and proceeded to Victim's apartment. Approximately four minutes later, Riddick and Guiness, still waiting in the car, heard a loud sound that they characterized as either one or two gunshots. A minute or two after that, Petitioner and Andrew McCreary ran towards the car, Petitioner told Riddick that the loud noise was the apartment door slamming as he ran out of the Victim's apartment. However, Petitioner told Guiness that the loud noise was caused by him knocking over a garbage can after he heard someone jump out of a back window. Petitioner, Riddick, Guiness and Andrew McCreary then returned to Petitioner's home.

That same night, Petitioner and Andrew McCreary visited Ramlakhan's house. They told her that they had visited the Victim and that he had agreed to pay the outstanding debt. Petitioner told Ramlakhan that, while he was in the Victim's apartment, he had heard a back window slam and immediately fled the apartment. Petitioner also told Ramlakhan that he had used her keys to unlock the Victim's door.

On the morning of April 30, 1991, the Victim was found lying unconscious in a pool of blood, suffering from a gunshot wound to the head. (The Victim later died from this wound.) Police found no evidence of forced entry. That day, Guiness overheard Andrew McCreary ask Petitioner why he had shot Ramnath. Petitioner answered: "It just happened, he just slipped."

On May 2, 1991, Police Detective Peter Blum interviewed Ramlakhan. During this interview, Ramlakhan disclosed that Petitioner had visited the Victim on the night of April 29, 1991. Andrew McCreary, the brother, was arrested on May 3, 1991. Andrew McCreary ultimately pleaded guilty to burglary.

Petitioner was arrested later in the day on May 3, 1991. After advising Petitioner of his *Miranda* rights, once prior to each session, Petitioner was questioned in both the squad car and at the police station. In the squad car, Petitioner stated that he and Andrew McCreary left the Victim's apartment after hearing a loud noise. At the station, Petitioner again waived his Miranda rights. Petitioner stated that he confronted the victim with a "cocked" gun to demand the return of Ramlakhan's money and that the "gun just went off." Petitioner then demonstrated the sequence with an unloaded gun. Finally, Petitioner wrote and signed a written confession.

Petitioner's case went to trial before a jury at the County Court of Nassau County.

At Petitioner's trial, Petitioner's brother, Andrew McCreary, was mentioned at several junctures. The prosecution's opening statement included the following discussion of Andrew McCreary:

> [The detectives] go out and on May 3, 1991, they arrest Andrew [] McCreary. Andrew [] McCreary is arrested outside his premises in Freeport at 100 Wallace Avenue, on the early morning of May 3, 1991. He is taken to the homicide squad for questioning. As a result of the information that they learn-- excuse me. Withdrawn. Following the discussions with Andrew [] McCreary, and

> with different members of the McCreary household, police cars are then dispatched . . . [Petitioner] is [then] arrested by members of the homicide squad....
>
> Then what happens is that the detectives say to him, 'look [Petitioner], I want to tell you something. Your brother is under arrest. He is in homicide squad. He's talking to us. [Ramlakhan] is at the homicide squad. She is cooperating with the investigation. And we know what happened here.'

Tr. 618-620. Petitioner's counsel did not object to this portion of the opening statement. At trial the prosecution elicited all of the information discussed *supra*. The prosecution also elicited the following testimony from one of the assigned detectives:

> After that, I had a conversation with [Petitioner]. I told [Petitioner] that we had his brother in custody in the homicide squad, a fellow named [Andrew McCreary]. Another woman was in the homicide squad. She was assisting the investigation. Her name was [Ramlakhan]. <u>They were telling us what happened, what went on in the house in Freeport, you know. I told him there was no reason to lie about it. They were giving us all the information, and he might as well tell us what his part in the incident was.</u>

Tr. 1137 (emphasis added).

Another detective who had questioned petitioner testified to the following conversation:

> I said to him, 'Look, [Petitioner], we have been working all day and night.' I said, '<u>Your brother</u> [Andrew McCreary]

> is here. He's under arrest. He's in the other room and he's talking to the detectives and he's telling the truth.' I said, [Ramlakhan] is here. She's telling the truth.' I said, 'Jenny is here. She is telling the truth. .. . I said, 'Now, I would like you to have the opportunity to tell me what happened.

Tr. 959 (emphasis added). Another detective confirmed this sequence:

> We informed [Petitioner] that his brother had been arrested as well and that he was in [the] homicide squad talking to detectives, pertaining to this case, the burglary and the shooting of [] Ramnath and we also indicated that his friend, [Ramlakhan], was present at the homicide squad, talking to detectives there and providing information about what had occurred.

Tr, 1336-1337. Detective Towner then described the effect that this information had on Petitioner.

> [Petitioner] originally, in the beginning of the conversation, denied that he was at the house, . where the shooting took place. Shortly after, I went into the fact that his brother was under arrest for the incident, in the homicide squad, and cooperating.. .. [Petitioner] started giving me what I consider partial admissions. He placed himself at the location at that point. He said he did go over to the house .... He was going to go over to the house... to get money that was owed by this fellow to [Ramlakhan].

Tr. 1139.

> In his defense, Petitioner called several character witnesses

as well as an expert on the amount of finger pressure necessary to trigger the discharge of a gun. Andrew McCreary, the brother, never testified at Petitioner's trial.

Prior to deliberations, the County Court Judge instructed the jury, with regard to reasonable doubt, as follows:

> Reasonable doubt. Now the term reasonable doubt may become clearer when you become aware of what a reasonable doubt is not. A reasonable doubt is not the doubt based upon the result of sympathy, or of a whim or sentimentality or a doubt arising out of a reluctance of a juror to do a disagreeable duty. A groundless surmise or groundless suspicion is a foundless [sic] basis to support a reasonable doubt. A vague conjecture, a vague doubt, a capricious or speculative doubt, an arbitrary, imaginary or uncertain or mere possible doubt is not a reasonable doubt.
>
> A reasonable doubt is a really serious, well[-]founded or actual doubt, arising out of the evidence or lack of evidence in the case, and existing only after a consideration of all the evidence in the case. The standard of proof beyond a reasonable doubt required for a conviction, as I say, applies to trial evidence taken as a whole. That means that all the evidence in the case, exhibits, testimony and stipulations. The proof beyond a reasonable doubt is not required to be applied to the testimony of each witness relied upon by the People. The standard, keep in mind, applies to the evidence taken as a whole. Therefore, the standard of proof, proof of guilt beyond a reasonable doubt, does not require the People to prove the Defendant's guilt beyond all possibility of a doubt or beyond a shadow of a doubt or beyond any doubt. That is not our standard.

It requires the People to establish the Defendant's guilt beyond a reasonable doubt. What does the law mean when it uses the phrase of reasonable doubt? A doubt of a Defendant's guilt to be a reasonable doubt, must be a doubt for which some reason can be given. The doubt to be a reasonable one must, therefore, arise because of the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case. The doubt to be a reasonable doubt should be one which a reasonable person, acting in a matter of this importance, would entertain because of the evidence or because of the lack or insufficiency of the evidence in the case. I therefore repeat and emphasize that a doubt of Defendant's guilt to be a reasonable doubt, must arise either from the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case.

A reasonable doubt, as is meant by the law, is an actual doubt, one of which you are aware of having in your mind, after you have considered all of the evidence in case.

Now, if, after doing so,. you then feel uncertain and are not fully convinced of the Defendant's guilt, and you are satisfied that in entertaining such a doubt, you are acting as a reasonable person should act in a matter of this importance, then that is a reasonable doubt of which the Defendant is entitled to the benefit. And whenever such reasonable doubt exists as to any material element necessary for conviction of a crime charged, you must, by law, give the Defendant the benefit of that doubt and find the Defendant not guilty.

On the other hand, if no such reasonable doubt exists, or,

> in other words, you are convinced of the Defendant's guilt beyond a reasonable doubt, you may then, by law, convict the Defendant and find him guilty.

Tr. 1700-1703.

The County Court Judge also instructed the jury, in relevant part, as follows: (1) in one portion of the burglary charge, that burglary could be established if the Petitioner "unlawfully entered or remained" in Victim's house; (2) with regard to the robbery charge, the County Court's summary of the elements did not include the element of force, though the balance of the instruction did discuss "force" and (3) with regard to the depraved indifference murder charge, the County Court Judge instructed the jury to focus on Petitioner's state of mind at the time the shot was fired, not on the moments leading up to that event.

On February 11, 1993 a jury convicted Petitioner for one count of murder in the second degree, pursuant to New York Penal Law § 125.25(2), two counts of felony-murder, pursuant to New York Penal Law § 125.25(3), and two counts of burglary in the first degree, pursuant to New York Penal Law § 140.30(2) & 140.30(4). Petitioner was sentenced to 25 years to life for the three murder counts and 8 and 1/3 to 25 years on the two burglary counts. The sentences were to be served concurrently.

Petitioner's subsequent appeals, to the New York Appellate Division, Second Department, and the New York Court Appeals were unsuccessful. On March 9, 1999, pursuant to 28 U.S.C. § 2254, Petitioner brought the instant petition for a writ of habeas corpus. In this petition, the Court identifies six proposed grounds: (1) Petitioner's Sixth Amendment right to confront witnesses was violated via the prosecution's references to

Petitioner's brother, Andrew McCreary, during the trial; (2) the County Court's erroneous jury instructions regarding "reasonable doubt" impermissibly shifted the burden of proof to Petitioner, in violation of his due process rights; (3) the County Court's erroneous jury instructions regarding the elements of the charged crimes violated Petitioner's rights to due process and a jury trial; (4) Petitioner was denied effective assistance of counsel; (5) Petitioner was denied the right to counsel when the County Court failed to make a "searching inquiry" before allowing him to proceed pro se and (6) Petitioner was denied his right to counsel when the County Court denied Petitioner's motion for reassignment of counsel.

The Court respectfully referred the petition to Magistrate Judge Lindsay to Report and Recommend on whether a writ of habeas corpus should be granted. Judge Lindsay recommended that Petitioner's application for a writ of habeas corpus be denied on the grounds that (1) Petitioner's constitutional right to confront witnesses was not violated, (2) the New York State County Court's jury instructions regarding "reasonable doubt" did not violate his due process rights, (3) the New York State County Court's jury instructions regarding the elements of the charged crimes did not violate his due process rights, (4) Petitioner's trial counsel was not constitutionally defective, (5) Petitioner's right to counsel was not deprived "when the County Court failed to make a searching inquiry before allowing him to proceed pro se" and (6) Petitioner was not denied the right of counsel "when the County Court refused to grant Petitioner's motion for reassignment of counsel and did not inquire whether he was proceeding pro se at trial."

II. Discussion

A. Standard of Review.

Where a party raises specific objections to a Magistrate Judge's Report and Recommendation, the Court must conduct de novo review of those specific issues. 28 U.S.C. § 636(b)(l); Grassia v. Scully, 892 F.2d 16, 19 (2d Cir, 1989). Petitioner articulates an objection to essentially every reason offered by Judge Lindsay. As such, the Court reviews the entire Report de novo.

B. The Current Standards for Habeas Corpus Petitions,

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a court may only issue a writ of habeas corpus for a state prisoner if the state-court adjudication was (1) "'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,'" or (2) "'involved an unreasonable application of.. . clearly established Federal law, as determined by the Supreme Court of the United States.'" *Lindstadt v. Keane*, 239 F.3d 191, 198 (2d Cir. 2001) (*quoting Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523 (2000). If the state court arrives at a conclusion of law opposite to that reached by the Supreme Court or decides a case differently "on a set of materially indistinguishable facts," that decision may be considered "contrary to" established federal law, *Lindstadt*, 239 F.3d at 198. Similarly, if the state court unreasonably applies the correct principle from the Supreme Court jurisprudence that would be considered an "unreasonable application." *Id.*

C. The Prosecution's Discussion of Andrew McCreary.

"In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him.. . ." U.S. Const. Amend, VI. "A defendant's right to confront the witnesses

against him includes the right not to have the incriminating hearsay statement of a nontestifying codefendant admitted in evidence against him," *Mason v. Scully*, 16 F.3d 38,42 (2d Cir. 1994). Violation of this right is referred to as a *Bruton* violation, in reference to the Supreme Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968).

An important reason for the exclusion of assertions that accuse the defendant without the actual testimony of the accuser is that "'their credibility is inevitably suspect,'" and, therefore, the evidence is inherently unreliable. *Mason*, 16 F.3d at 42 (quoting *Bruton*, 391 U.S. at 136). However, "the *Bruton* problem arises ... [w]henever the [accuser]'s statement, admission, or confession inculpates the objecting defendant, regardless of the possible truth of the accusation." *United States v. Danzey*, 594 F.2d 905, 918 n. 13 (2d Cit 1979). However, "[a] *Bruton* violation ... occurs only when the statement is both 'clearly inculpatory' of the defendant and 'vitally important' to the prosecution's case," *United States v. Slocum*, 695 F.2d 650 F.2d 655 (2d Cir. 1982).

"To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit." *Mason*, 16 F.3d at 42-43. "Thus, testimony that indirectly includes an accusation against the defendant may violate the Confrontation Clause even if the testimony is not a direct reiteration of the accusatory assertion." *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir 2002). "If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible," *Id.* at 249. *Ryan v. Miller* instructs the Court to examine the context and circumstances of the proffered testimony. *Id.* From these circumstances, specifically in the context of encouraging a confession from Petitioner by suggesting that his

compatriots had implicated him, the substance of Andrew McCreary's discussion seems clear. The context of the officers' testimony raises an inference that Andrew McCreary named Petitioner as a participant in the events of April 19, 1991 (the date of Ramnath's death). Therefore, to the extent that Judge Lindsay's Report concluded that the confrontation right was not implicated, this Court disagrees.[3]

Despite this error, if the Court concludes that the confrontation clause error is harmless, habeas relief is improper. *See Fuller v. Gorczyk*, 273 F.3d 212,220 (2d Cir, 2001). Petitioner contends that Judge Lindsay, in the Report, applied an incorrect harmless error analysis. Specifically, Petitioner contends that Judge Lindsay should have applied the harmless error standard "enunciated in *Chapman v. California*, 386 U.S. 18,24... (1967)." Petitioner's Objections at 7. Petitioner's argument is incomplete. As the law is currently set out by the Second Circuit, it is unclear whether the Court should apply the harmless error standard enunciated in *Chapman* or the one set out in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *See Ryan v. Miller*, 303 F.3d at 249.

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[3]Unfortunately, Petitioner's counsel did not object to this evidence at trial. Therefore, the County Court Judge never ruled on this issue. It is also unclear whether the confrontation clause issue was presented on direct appeal to the New York State Appellate Division, Second Department. See *People v. McCreary*, 681 N.Y.S.2d 541, 54]. (2d Dep't 1998) ("The defendant's remaining contentions are either unreserved for appellate review or without merit."). However, Petitioner and Respondent do not contend that this confrontation clause issue is unexhausted. Therefore, the Court assumes that the issue was presented to the Appellate Division which concluded that there was no confrontation clause problem. *Cf. United State v. Aulicino*, 44 F.3d 1102, 1109 (2d Cir. 1995) (describing "plain error" analysis for correcting confrontation clause errors not raised at trial).

In *Ryan v. Miller*, the Second Circuit, with regard to harmless error analysis, stated: "We need not decide which harmless error standard applies to post-AEDPA habeas cases." *Ryan v. Miller*, 303 F.3d at 253-254. Instead, the Second Circuit applied both standards and found that error had occurred under either standard. *Id.* at 254 ("Because we, too, find that the error was not harmless under either standard, we do not decide which test applies."). In view of the Second Circuit's approach in *Ryan v. Miller*, the Court, in the instant petition, also applies both standards. *Cf. Wray*, 202 F.3d at 525-26 (applying the *Brecht* standard without any discussion of the *Chapman* standard).[4]

Under the *Chapman* analysis, "an error was harmless if it was 'harmless beyond a reasonable doubt,' meaning that the reviewing court found 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Ryan v. Miller*, 303 F.3d at 254 (quoting *Chapman* 386 U.S. at 24). On the other band, under the *Brecht* standard, "an error was harmless if it did not result in 'actual prejudice,' that is, it did not have a 'substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting Brecht, 507 U.S. at 637). The Court after review of Petitioner's argument and of the record, concludes that the identified confrontation clause error was harmless under either analysis.

At trial, two cooperating witnesses, Guiness and Riddick, testified that they saw Petitioner enter the Victim's building, One of these witnesses, Guiness, testified that he had seen him draw a gun

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[4]The Court notes that Judge Lindsay's Report stated that there was no error. However, the Report also stated, in the alternative, that if, arguendo, there was error, it was harmless. *See* Report at 16-17. The Court agrees with this latter conclusion for the reasons stated in the text, *infra*.

after unlocking the door with a key. Later, both Guiness and Riddick testified that they heard gun shots, followed by Petitioner running back to the car. Guiness also testified that he later overheard Petitioner admit that he had shot the Victim. Moreover, Ramlakhan testified that Petitioner admitted that he was at the scene and that she had provided the key to the Victim's house. The ability to cross examine Ramlakhan is especially notable because most of the testimony regarding Andrew McCreary's statements implicitedly implicating Petitioner also incorporates mention of similar statements by Ramlakhan. *See e.g.* Tr 1 141-1142 ("I was aware at the time that [Ramlakhan] was giving them information in the homicide squad. I was aware that his brother, [Petitioner]'s brother, here, was giving information."). Finally, Petitioner confessed, both orally and in writing. This confession was made in conjunction with his identification of items from the crime scene and construction of a layout of the crime scene that correlated with the forensic evidence. No attempt has been made, in conjunction with this proceeding, to challenge the voluntariness of these confessions,

In light of the foregoing facts, the inadmissible aspects of the pertinent testimony, viewed in relation to the prosecution's formidable array of admissible evidence, was essentially cumulative. *See Ryan v. Miller*, 303 F.3d at 255[5]; *see also Wray,* 202 F.3dat 526 ("[Where the wrongly admitted evidence was cumulative of other properly admitted evidence, it is less likely to have injuriously

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[5]The Court notes that the prosecution's case in *Ryan v. Miller* was far weaker than the one brought against Petitioner. In Ryan v. Miller, the Circuit noted that the testimony of the arresting officers "was the lynchpin of the prosecution's circumstantial case" and that their "testimony was not cumulative of other evidence, in part, because of the lack of other evidence." *Id.* at 254~255. The strength of the prosecution's case renders the circumstances of the current petition differentiable from the circumstances in *Ryan v. Miller*.

influenced the jury's verdict."). Accordingly, the identified error did not affect substantial rights. Nor did it affect the fairness and integrity of the proceedings or yield a miscarriage of justice. *Wray*, 202 F.3d at 526; *see also Dukagjini*, 2003 WL 1063153, at *12. The error also did not have any "substantial and injurious effect or influence in determining the jury's verdict." *Ryan v. Miller*, 303 F.3d at 254 (quoting *Brecht*, 507 U.S. at 637). Finally, "assuming that the damaging potential of the [confrontation clause error] were fully realized," the Court concludes "that the error was harmless beyond a reasonable doubt." *Fuller*, 273 F.3d at 220 (applying *Chapman*). As such, the Court finds that the County Court's admission of testimony in violation of the Confrontation Clause, while admittedly error, constituted harmless error under either of the alternate standards of review. Therefore the Court cannot conclude that the state-court adjudication was (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,'" or (2) "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.'" *Lindstadt,* 239 F.3d at 198 (quoting *Williams*, 529 U.S. at 412-413).

D. The County Court's Jury instruction with Regard to "Reasonable Doubt,"

Petitioner contends that the County Court's instruction to the jury that "[a] reasonable doubt is a really serious, well[-]founded doubt," impermissibly shifted the burden of proof, in violation of his due process rights. "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1,5 (1994). In fact "the Constitution does not require that any particular form of words be used in advising the jury of the government's

burden of proof." *Id.* "Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" *Id.* (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)).

As this standard is applied, "a state prisoner making a claim of improper jury instructions faces a substantial burden." *Del Valle v. Armstrong*, 306 F,3d 1197, 1200 (2d Cir, 2002). Where as in the instant petition, Petitioner failed to object to the instruction at trial, the controlling inquiry is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned.'" *Henderson v. Kibbe*, 431 U.S., 145, 154 (1977) (quoting *Cupp v. Nauggen* 414 U.S. 141, 146-47 (1973)) (footnote omitted). In its analysis of the challenged instruction, the Court should adhere to the "well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp*, 414 U.S. at 146-47; *see also Victor*, 511 U.S. at 5 (stating that a charge must be evaluated "as a whole").

Petitioner emphasizes the fact that the challenged definition of "reasonable doubt" was the first definition provided to the jury. While this fact must be considered while evaluating the context of the entire charge, it is ultimately unpersuasive. The Court has reviewed the entire charge and agrees with Judge Lindsay's analysis. With that said, the Court addresses the individual arguments raised in objection to Judge Lindsay's Report.

Specifically, the Court notes that the challenged definition was immediately preceded by a sentence that contrasted a "reasonable doubt" with "[a] vague conjecture, a vague doubt, a capricious or speculative doubt." Tr. 1700. Petitioner contends

that this language prohibited the jury from considering vague or uncertain doubts. The Second Circuit has stated that "instructions tying 'reasonable doubt' to a doubt 'for which you can give a reason' may well be unwise, because of the possibility that such an instruction will 'intimidate a juror by suggesting that he may be called upon to explain his doubts." *Vargas v. Keane*, 86 F.3d 1273, 1277 (2d Cir, 1996) (quoting *United States v. Davis*, 328 F.2d 864, 867 (2d Cir. 1964)). However, where the surrounding passages adequately "directed the jury to ground their decisions in the evidence" and "emphasized the prosecution's burden of proof," the Second Circuit has found that "the jurors were unlikely to [mis]understand the instruction." *Id.* The Court finds that the surrounding language of the charge adequately addresses these concerns. *See* text of County Court's reasonable doubt charge quoted at p. 6-7, *supra*. Specifically, the Court refers to this explanation provided by the County Court, after both the nature of the government's burden of proof and the requirement that their verdict be based on the evidence had been provided to the jury:

> Now, if, after [evaluating all of the evidence], you then feel uncertain and are not fully convinced of the Defendant's guilt, and you are satisfied that in entertaining such a doubt, you are acting as a reasonable person should act in a matter of this importance, then that is a reasonable doubt of which the Defendant is entitled to the benefit. And whenever such reasonable doubt exists as to any material element necessary for conviction of a crime charged, you must, by law, give the Defendant the benefit of that doubt and find the Defendant not guilty.

Tr. 1703. In light of this language, taken in the context of the entire jury charge, the Court agrees with Judge Lindsay's conclusion that the challenged language did not leave "the jury uncertain of the

standard it was charged with applying." *United States v. Birbal*, 62 F.3d 456, 460 (2d Cir, 1995), Which is to say, the Court "do[es] not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one." *Victor*, 511 U.S. at 21, 18-21 (affirming conviction that involved instruction that stated: "A reasonable doubt is an actual and substantial doubt. . .") (emphasis in original).

B. Certain Jury Charges on the Elements of the Charged Crimes.

1. The Burglary Charge.

Petitioner complains that the trial judge, in defining the trespass element of burglary, instructed "unlawful remaining" as an alternative to "unlawful entry." The "unlawful remaining" language in New York State Penal Law § 140.20 pertains to a situation in which a defendant "entered legally, but remain[ed] for the purpose of committing a crime after authorization to be on the premises terminate[d]," a circumstance not present here. *People v. Gaines*, 74 N.Y.2d 358, 363 (1989). However, as noted by Judge Lindsay, "if any criminal intent had been formed [by Petitioner], it had been formed prior to entering David's cottage." Report at 23. That conclusion is essentially inescapable given the testimony that Petitioner went to the victim's home to scare him into repaying a debt owed to Ramlakhan and pulled out a gun after unlocking, but immediately prior to opening the victim's door. Under such circumstances, even though the "remaining unlawfully" language should not have been included in the charge, its inclusion was not reversible error under state law. *People v. Fenderson*, 203 A.D.2d 585, 586 (2d Dep't 1994); *People v. Martinez*, 173 A.D.2d 333, 333 (1st Dep't 1991) ("[T]here [was no] reasonable

view of the evidence that would lend itself to the conclusion that the defendant's intent was formed subsequent to his unlawful entry.").

And even if the trial court's burglary instruction was error, that does not necessarily warrant habeas relief. *Alvarez v. Scully*, 833 F. Supp. 1000, 1008 (S.D.N.Y. 1993). As noted with respect to the challenged reasonable doubt charge, the issue is not whether the instruction was erroneous, but whether the instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp,* 414 U.S. at 141. The instruction under discussion may not legitimately be so characterized. Although the trial judge did interjected the concept of "unlawfully remained" into his instruction on several occasions, a perusal of the charge in its entirety reflects that he underscored that the requisite intent for burglary had to exist before Petitioner entered the Victim's quarters. *See, e.g.*, Tr. at 1732; 1733 ("[t]he crime of burglary is complete when a person knowingly and unlawfully enters into a building or dwelling with the intent to commit any crime, whether or not he actually commits a crime ultimately therein"); 1829-30; 1833; 1834-35; and 1836. In sum, Judge Lindsay was correct in concluding that "it is unlikely [that] the jury misunderstood the charge." Report at 23.

Petitioner objects to this conclusion by Judge Lindsay, arguing that (1) "the burglary charge did not specify which crime [Petitioner] was claimed to have intended to commit . . . and (2) [Petitioner] Was separately charged with depraved indifference murder for his alleged reckless conduct while inside the house." Petitioner's Objections at 14 (emphasis in original). As such, Petitioner contends that "the jury could have found that [Petitioner] formed an intent to commit a crime once inside the property." *Id.* This argument is unpersuasive. As just explained, it is clear that Petitioner went to, and unlawfully entered the Victim's home

handgun drawn for the purpose of committing some crime, presumably assault. Such conduct and scienter constitutes burglary. That is so even if Petitioner thereafter decided to commit a different or additional crime. *Alvarez*, 883 F. Supp. at 1006. There was no reasonable view of the evidence consistent with the theory that Petitioner entered the home for an innocent reason and "while inside the house" decided to engage in criminal conduct. Accordingly, the attack on the trial court's burglary charge lacks merit.

2. Robbery Charge.

Petitioner claims that the County Court committed error when it neglected to include the "forcible" element in its summary of the elements of robbery, although the Court articulated all the elements of robbery earlier in the charge. Judge Lindsay concluded that: "Failure to include all [of] the elements of the crimes charged when summarizing the charge, especially when such words 'were the last words heard by the jury,' constitutes error under New York law." Report at 23. Ultimately, however, Judge Lindsay concluded that the error was harmless. Petitioner objects by stating that Judge Lindsay utilized the incorrect harmless error standard and reached the incorrect conclusion. At trial, Petitioner's counsel did not object to the omission of the "force" element from the summary portion of the Court's charge.

"The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson*, 431 U.S. at 154. In such a collateral proceeding the Court must consider "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp*, 414 U.S. at 147, not merely whether "the

instruction is undesirable, erroneous, or even 'universally condemned, " *id.*, at 146.

In instant petition, the Court concludes that the failure to instruct on the issue of force in its summary of the elements was nonprejudicial beyond any reasonable doubt. *Chapman*, 386 U.S. at 24. The charge repeatedly instructed the jury that "[r]obbery is forcible stealing." Tr. at 1741; *see also id.* (elsewhere on 1741) and at 1781; 1820-21; and 1822. Therefore, viewing the charge as a whole, the error was harmless and did not "so infect[] the entire trial hat the resulting connection violates due process."

The Court is aware of Petitioner's argument that the "there was evidence that after the shot rang out, [Petitioner] and Andrew [McCreary] did not immediately run out of [Ramnath]'s house, but allegedly remained there for two full minutes, without [Ramnath] around to guard them from going through his belongings" and that these circumstances could have allowed the jury to "conclude[] that the stealing element of the robbery occurred after [Ramnath] was accidently shot." Petitioner's Objections at 15. To the extent that the Court understands the theory advanced by Petitioner, this argument is not persuasive. This speculative possible interpretation of the facts does not change the simple fact that, viewing the charge as a whole, the jury was provided with the correct elements and that the error was harmless.

2. Depraved Indifference Murder Charge.

Petitioner claims that the County Court erred when it instructed the jury to focus on Petitioner's state of mind at the time the shot was fired rather than at the time he raised the gun and pointed it at the Victim's head. The magistrate found no error in this instruction. Plaintiff asserts that this conclusion was in error. The

Court's de novo review of the record and applicable case law leads the Court to agree with Judge Lindsay's conclusion.

F. Ineffective Assistance of Counsel.

"In a petition for habeas relief alleging ineffective counsel . . . [such] claim[s] are squarely governed by [the Supreme Court's] holding in *Strickland v. Washington*[, 466 U.S. 668 (1984)].'" *Lindstadt*, 239 F.3d at 198 (citations omitted). Pursuant to *Strickland*, the petitioner ordinarily must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. 466 U.S. at 687-88. The latter showing is required because even a professionally unreasonable error by counsel does not warrant setting aside a proceeding if such error did not affect the outcome of the proceeding. *Id.* at 691-92.

In certain discrete circumstances, the courts have recognized unusual cases in which prejudice may be presumed. One example is a situation in which there is a showing of actual conflict of interest between and defendant and her attorney. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Likewise, prejudice may presumed where counsel is physically absent during a critical stage of the proceedings, *Geders v. United States*, 425 U.S. 80 (1976), or where the attorney sleeps through a substantial portion of the trial, *Javory. United States*, 724 F,2d 831 (9th Cir, 1984). In the instant petition Petitioner's objections have not suggested that the conduct of Petitioner's attorney should warrant a per se finding of prejudice.

As an initial matter, Petitioner contends that Judge Lindsay erred when she ruled on Petitioner's ineffective assistance of

counsel claims without an evidentiary hearing. Petitioner cited *Strouse v. Leonardo*, 928 F.2d 548, 554 (2d Cir. 1991), for the proposition that a court "must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." However, in *Strouse*, the Second Circuit was discussing an alleged conflict of interest that would per se invalidate the effectiveness of his trial representation. *See id.* Such a situation is differentiable from the current claims that the failure to object at certain critical times rendered counsel ineffective. Therefore, the Court turns to the errors attributed to Petitioner's trial counsel.

Petitioner identifies five errors committed at trial. These errors include: (1) failure to object to the "*Bruton* violations" discussed earlier, (2) failure to object to the jury instructions, (3) failure to adequately object to the disclosure that Petitioner was held in jail following arrest, (4) failure to request that Petitioner's contemplated testimony be confined to the voluntariness of his confession and (5) failure to object to the prosecution's demonstration of a different firearm. To demonstrate constitutionally ineffective assistance of counsel, Petitioner is obligated to demonstrate that his counsel made errors "so serious that counsel was not functioning as the ~counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "In gauging the deficiency, the court must be 'highly deferential,' must 'consider[] all the circumstances,' must make 'every effort, . . to eliminate the distorting effects of hindsight,' and must operate with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . Id. at 688-89.

With the exception of Judge Lindsay's analysis of the *Bruton* issue, the Court agrees with her rationale and concomitant conclusions regarding Petitioner's claim of ineffective assistance of counsel, including her observation about Petitioner's failure to satisfy

the second prong of the *Strickland* test, to wit, prejudice. And given the nature of the *Bruton* error and its harmless character, there is no reasonable probability that the jury's verdict would have been different had counsel objected to the subject evidence.

G. Failure to Conduct a Searching Inquiry.

Petitioner objects to Judge Lindsay's conclusion that, because there was no unequivocal waiver of counsel, there was no requirement to embark on a "searching inquiry." Under the Sixth Amendment, the accused is guaranteed the right of electing to represent himself. *Faretta v. California*, 422 U.S. 806 (1975). A criminal defendant may proceed pro se if he "knowingly, voluntarily, and unequivocally" waives his right to appointed counsel. *Williams v. Bartlett*, 44 F.3d 95, 99 (2d Cir. 1994). "A criminal defendant must make a timely and unequivocal request to proceed pro se in order to ensure the orderly administration of justice and prevent the disruption of both the pre-frial proceedings and a criminal trial." *Id.* However, the trial court is constitutionally required to conduct an inquiry to ensure that Petitioner was "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835 (1975) (quoting *Adams v. United States*, 317 U.S. 269, 279 (1942)).

The County Court denied Petitioner's motion for reassignment of counsel in a written decision dated July 13, 1991. Subsequently, Petitioner filed a second motion for leave to proceed ~ In its October 7, 1991, written decision on this renewed motion, the County Court indicated that it had, previously, "fully advised the defendant of the risks he may incur by so proceeding and directed the defendant's present attorney, Lori Golombeck, Esq., to stand by and assist...."

On October 24, 1991, the County Court conducted a suppression hearing. The court observed at the beginning of the hearing, "Keep in mind, too, that Ms. Golombek's client, the last we heard, was pro se." At this hearing, however, Petitioner made no attempt to present argument on his own behalf or to examine any witnesses and did nothing to indicate that he was proceeding ~ Instead, Ms Golombeck fully proceeded on his behalf. On the second day of the hearing, when the court inquired whether Petitioner was satisfied with Ms. Golombeck's representation, Petitioner indicated that he wished for her to continue her representation and that he was satisfied with her performance. On the fifth day of the hearing, after direct examination by Ms. Golombeck of the final defense witness, the following exchange took place:

Ms. Golombeck: I have no further questions.

County Court: Anything else?

Ms. Golombeck: My client would like to ask some questions.

County Court: Now he decides to go pro se again?

Petitioner: You said I was still pro se and that she can speak for me.

County Court: No, I didn't say that. You originally made an application and after I went through the whole business with you and told you how foolish I thought it was, I said, "You have the right to go pro se, but I would assign Ms. Golombeck to stand by." You said you wanted her to represent you. Now I am not going to have it both ways. Either you do it by yourself and get

her advise or she does it for you. Now, I am not going to have you put another hat on in the middle of a heaxing and say: Okay, this is what I want to do for this question. It is not going to be that way. If you have a question you want to have asked, have your lawyer do it for you.

Petitioner: I want to do it myself.

The Court: All right. Remember what I told you. You will be held to the same standard as a lawyer. If there is an objection made and it is not asked properly, I have to rule on it.

Ask your questions.

Petitioner asked five questions and the hearing ended.

Ms. Golombeck, on the first day of trial, acknowledged that although the Petitioner had initially expressed the desire to proceed *pro se* he had agreed to her representation not only for the hearing, but for the trial as well. Counsel further acknowledged that Petitioner "never really wanted to go pro se." Other than the October 7, 1991, order, there is no record that the County Court conducted a "searching inquiry."

Petitioner's contention is that it was error for the County Court to not conduct a searching inquiry. This argument fails to persuade the Court. Even if the Court assumes that Petitioner did make a clear and equivocal waiver of counsel, a detail that is subject to debate, and that the County Court failed to conduct the proper "searching inquiry," Petitioner's argument must still fail because the facts show that he suffered no actual prejudice.

Stephens v. Lacy, 914 F.Supp. 44, 45 (E.D.N.Y. 1996); *cf. Abraham v. United States*, 549 F.2d 236, 238 (2d Cir. 1977) (stating that appellants direct appeal argument that an alleged Sixth amendment violation invalidated their convictions must fail, in part, because they had failed to show prejudice). Review of the record shows that, for the entire suppression hearing, stand-by counsel was with Petitioner. Moreover, other than the five questions at the end of the hearing, Petitioner made no action to represent himself. De novo review of the record reveals that Petitioner was effectively represented by counsel for this entire hearing. As such, the Court finds that Petitioner cannot show actual prejudice and that this theory cannot form the basis for habeas relief,

H. County Court's Refusal to Reassign Counsel,

Petitioner objects to Judge Lindsay's conclusion that the County Court judge did not err when it denied Petitioner's motion for substitution of counsel. The Second Circuit "has long recognized that certain restraints must be put on the reassignment of counsel lest the right be 'manipulated so as to obstruct the orderly ptocedure in the courts or to interfere with the fair administration of justice." *McKee v. Hanis*, 649 F,2d 927, 931 (2d Cir. 1981) (quoting *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir, 1963). In keeping with that knowledge of the limits that should properly operate on the request for re-assignment of counsel, the decision whether to pemiit substitution of counsel is within the discretion of the trial judge and turns on the facts of the case. *See McKee*, 649 F.2d at 931; *People v. Arroyave*, 49 N.Y.2d 264(1980). It is not sufficient for a defendant to request a new lawyer. Rather, "a defendant seeking substitution of assigned counsel ... must afford the court with legitimate reasons for the lack of confidence." *McKee*, 649 F.2d at 932.

On the day before the trial was to commence, Petitioner's counsel told the court that Petitioner desired reassignment of counsel: (1) because be perceived a "conflict of interest," (2) because he felt that counsel was not providing him with competent advice, (3) because he felt that counsel's pre-trial investigation was lacking and (4) because he felt that counsel had not conferred with him a sufficient number of times. Upon hearing this, the County Court judge asked Petitioner why he was dissatisfied with counsel, Petitioner replied:

> Your honor I've fried on a few occasions to have [counsel] taken off my case. I don't feel comfortable with her and we just can't seem to get anything together. And I have a very, very serious case. And I would ask you to take her off my case, please. I don't mean to prolong this any longer than it has to be. That is not my motive.

Petitioner offered no further information as to why he desired substitution of counsel.

Judge Lindsay correctly noted that the reasons listed by Petitioner were insufficient to warrant reassignment of counsel. Petitioner contends this was error because the County Court judge was obligated to inquire further about the reasons listed earlier by counsel. The Court does not agree with Petitioner's argument. "A defendant with assigned counsel cannot decide for no good cause on the eve or in the middle of trial that he will have another attorney represent him." *United States v. Calabro*, 467 F,2d 973, 986 (2d Cir, 1972). The trial judge, in his proper exercise of discretion, decided that no good cause was shown. *See McKee*, 649 F.2d at 931. Petitioner has failed to cite any persuasive authority that further inquiry, beyond asking Petitioner for his reasons, is a necessary condition precedent to the exercise of this discretion.

Accordingly, the Court finds no error in Judge Lindsay's conclusion.

III. Conclusion

For the foregoing reasons, the Court adopts, subject to the modifications listed herein, the conclusions of Judge Lindsay's thorough and well-reasoned Report. Therefore, the request for issuance of a writ of habeas corpus is DENIED. Likewise, pursuant to Fed. R. App. Pro. 22(b) and 28 U.S.C. § 2253(c)(2), a certificate of appealability is denied, as Petitioner has not made a substantial showing of a denial of a constitutional right. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4; *Luciadore v. New York State Div. Of Parole*, 209 F.3d 107, 112 (2d Cir. 2000). The Clerk of the Court is directed to CLOSE this case.

SO ORDERED

Dated: Central Islip, New York /S/
April 16, 2003 Denis R. Hurley, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ISAAC MCCREARY,

Petitioner,

against -

AMENDED REPORT AND RECOMMENDATIONS[6]

CV-99-1288 (DRH)

ROBERT HOKE, as Superintendent of the Eastern Correctional Facility; ELIOT SPITZER, as Attorney General of the State of New York,

Respondent.

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The District Court referred the instant habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, to the undersigned for a report recommending whether habeas relief is warranted. For the reasons set forth below, it is recommended that the District Court deny the petition.

STATEMENT OF FACTS[7] AND PROCEDURAL HISTORY

In the morning of April 30, 1991, Sudesh Ramnath ("David") was found by his roommate lying in a pool of blood on

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[6]Following a review of Respondent's objection, see Letter of Edward Miller, dated June 17, 2002, the Court hereby amends its previous Report and Recommendation, dated May 17, 2002 on pages 26-27.

[7]Additional facts are detailed below, as necessary, in the analysis of each of Petitioner's grounds for relief.

the floor of his home with a gunshot wound to the head, (T.652-656; TA I 14-15).[8] The night before, on April 29, 1991, Isaac McCreary ("McCreary" or "Petitioner") asked Phillip Riddick ("Phillip") to drive McCreary and his brother, Andrew Oliver McCreary ("Andrew"), to Roosevelt High School to pick up Carlos O'Neil Guiness ("Carlos"). After picking up Carlos, McCreary asked Phillip to take him to the apartment where David lived. McCreary explained to Phillip that he wanted to stop there to scare the occupant into repaying a debt. (T.780-85).

David apparently owed approximately $350 to Jenny Ramlakhan (then McCreary's girlfriend), who had lived with David following the breakup of her marriage. During the course of David and Jenny's relationship, David began to abuse Jenny, after which she moved out with the assistance of Andrew's wife, Evelyn McCreary ("Evelyn"). (T.1219-1240) Jenny, Carlos, and Phillip all testified for the government.

Shortly after arriving at David's apartment, McCreary and Carlos left the car, and a minute or two later, Carlos returned because he had seen McCreary pull out a gun after using a key to unlock David's front door. After asking Carlos why he had left McCreary alone, Andrew got out of the car and went to the

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[8]Numbers preceded by "T" refer to the page number of the trial transcripts. Numbers in parenthesis preceded by "P" refer to the page number in the Petitioner's Memorandum of Law in Support of the Petition. Similarly, numbers in parenthesis preceded by "R" refer to the page number in the Respondent's Affidavit and Memorandum of Law. Numbers in parenthesis preceded by "PR" refer to the page number in Petitioner's Reply Memorandum of Law in Support of the Petition. Numbers in parenthesis preceded by "H1," "H2," and "H3," refer to the hearing minutes of October 24-November 25, 1991 ("H1"), November 26-27, 1991 ("H2"), and December 3-11, 1991 ("H3").

apartment. About four minutes later, Phillip and Carlos, who testified at trial that they were familiar with guns and the sound of gunfire, heard one or two gunshots. A minute or two after that, McCreary and Andrew ran towards the car. (T.785-86; 828-32)

When McCreary entered the car, Phillip asked what had happened and was told by McCreary that the noise was from the door slamming as he ran out. (T.789) McCreary gave a different explanation to Carlos stating that he thought he heard someone jump out a back window and in a hasty retreat, McCreary had knocked over a garbage can. (T.833) McCreary then instructed Phillip to drive back to the McCreary household, but not too fast and using an evasive route. (T.787) Upon their return to the McCreary residence, Carlos stepped out for a beer. When he returned, Carlos was confronted by Andrew, who demanded to know where Carlos had gone and whether he had gone to the police. (T.834) That same night, McCreary and Andrew went to Jenny's house. They told her they had just come from David's home and he had agreed to repay her the money she was owed. McCreary told Jenny that while he was inside David's apartment he had heard a back window slam and ran from the apartment thinking someone else was present who might call the police. McCreary told her they had used her keys to gain entry to David's apartment, but inadvertently left them there. At first, McCreary asked Jenny to go to David's home to retrieve the key, but moments later, he reconsidered. (T. 1234-47)

On April 30, Police Officer Morgan O'Connell did a walk-through of David's apartment. He discovered no signs of forced entry and found the entry door deadbolt lock in the open position. (T.676-77) Later that day, Phillip, after seeing police activity at David's apartment, called McCreary to find out what had happened at David's apartment the night before. McCreary responded that

"[s]omething must have happened after we left." (T.790) Carlos testified that on April 30th, while he was in McCreary household, he overheard Andrew ask McCreary why he had shot David, to which McCreary replied, "It just happened, he just slipped." (T.837)

On April 30th, Jenny met for the first time with Detective Peter Blum. She was questioned by Blum, but initially did not reveal what she knew about the McCreary's visit to David's apartment the night of the shooting. A few days later, Jenny confronted McCreary suggesting they go to the police to report what they knew. McCreary urged Jenny not to get involved and to leave the matter to the police. (T.1253-56) About three days after the shooting.

McCreary asked his former mentor, Todd Jones, whether police retain fingerprints on file after five years have elapsed. (T.1201)

On May 2, 1991, Blum interviewed Jenny again, at which time she disclosed that McCreary and Andrew had gone to David's cottage the night of the shooting. (T.1256-61) The next day, Jenny identified Andrew, who was arrested outside his home. (T.942-50) Jenny also gave a written statement in which she admitted having withheld the information that McCreary and Andrew had been to her house, that they had told her they were at David's apartment, and that they had told her they had left her key in the door. (T.1256-1 319; 909-1030; 1395-1400)

On May 3, 1991, Detectives Towner and Brusa arrested McCreary. After advising him of his *Miranda* rights, McCreary was questioned in the squad car. McCreary initially denied being at David's apartment, but after being told that Jenny and Andrew

were at the homicide squad "telling us what happened," he later admitted entering the apartment with Jenny's key to collect money on her behalf. McCreary told the detectives that after he confronted David about the debt, he and Andrew left after hearing a noise. McCreary stated that they became concerned when they realized they had left Jenny's key behind and Andrew later returned to David's apartment to retrieve it. (T.l 129-52; 1323-30)

Once at the homicide squad, McCreary again waived his *Miranda* rights and was told that Andrew was under arrest and that Andrew, Jenny, and Evelyn were "cooperating" and "telling the truth." Thereafter, McCreary told Detective Blum he had entered David's apartment with Jenny's key, that he heard religious music playing inside, that he confronted David with a "cocked" gun demanding that David return Jenny's money, and that the "gun just went off." Detectives Lane and Blum played a music tape retrieved from David's apartment which McCreary identified as the music he had heard. Detective Lane gave McCreary an unloaded firearm and had him demonstrate how the gun had accidentally discharged. Lane then put on his own demonstration to prove that the gun could not have accidentally discharged as McCreary claimed. (T.951-59; 1366-68)[9]

Blum then reduced McCreary's statement to writing. In his written confession, McCreary stated he had begun dating Jenny about a month prior to the shooting, that she had given him access to her safe, and that he had borrowed money from her. McCreary stated that he spoke with people about going to the apartment to recover the debt, that he brought his gun to the apartment on the night of the shooting, and that he used Jenny's key to enter the

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[9]A similar demonstration was offered at trial.

apartment with Andrew. McCreary further stated that he pointed the gun at David to scare him and demanded the money David owed Jenny. To further intimidate David, who was obviously nervous, McCreary cocked the hammer of the gun. McCreary stated that David was about three feet away from him when the gun discharged. Both McCreary and his brother immediately ran from the premises. McCreary stated he threw the gun away and went to Evelyn's house before visiting Jenny. McCreary also stated that Andrew returned to the apartment to retrieve the key, because McCreary was concerned about fingerprints. McCreary signed the statement, but refused to make a videotaped statement. (T.962-1008) McCreary also identified and signed a diagram and photograph of the crime scene, pointing out locations where his confrontation with David occurred. This diagram correlated with the physical evidence found at the crime scene. (T. 995-1004,1613-1614) On or about May 12, 1991, some 12 days after the shooting, David died of a massive brain injury. (T.1 109)

In his defense, McCreary called several character witnesses, and produced an expert to testify about the amount of finger pressure needed to discharge a gun. McCreary's sister also testified that she broke up with Carlos, her former boyfriend, and that he had reacted violently.

Andrew Oliver plead guilty to burglary in the first degree and was sentenced to 4 to 12 yeas of imprisonment. McCreary was convicted on February 11, 1993 of one count of murder in the second degree pursuant to New York Penal Law § 125.25[2] ("Penal Law"), two counts of felony murder pursuant to Penal Law § 125.25[3], and two counts of burglary in the first degree pursuant to Penal Law § 140.30[2] and [4], after a trial by jury in the County Court of Nassau County. McCreary was sentenced to 25 years to life on each of the murder counts and 8½ to 25 yeas on each of the

burglary counts, all to be served concurrently. (P.i; R.3).

Subsequently, McCreary appealed his conviction to the Supreme Court of the State of New York, Appellate Division, Second Department. (P.i; R.3) On April 13, 1998, a four-judge panel of the Appellate Division unanimously affirmed the conviction. (P.i; R.4) By motion dated May 13, 1998, McCreary moved for reargument of his appeal and reconsideration of the Appellate Division's April 13, 1998 decision. (P.i; R.4)

By letter dated May 21, 1998 (before the Appellate Division issued it decision on the motion for reargument and reconsideration), McCreary sought leave to appeal the Appellate Division's decision to the New York Court of Appeals. (P.28-29; R.5) This application was denied by the New York Court of Appeals on September 24, 1998. *People v. McCreary*, 92 N.Y.2d 927 (1998).

On September 28, 1998, the Appellate Division issued its Decision and Order on Motion denying McCreary's motion for reargument and reconsideration. The Appellate Division did, however, on its own motion, vacate its Decision and Order, dated April 13, 1998, issuing in substitution a Decision and Order, dated September 28, 1998. The second Decision and Order was essentially identical to the first, except for the omission of its previous finding on McCreary's claim that there was insufficient evidence to support the conviction of depraved indifference murder. People v. McCreary, 253 A.D.2d 894, 894-95 (2d Dep't 1998).[10] McCreary's application for leave to appeal the September 28,

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[10]Petitioner notes that he never raised a claim of legal insufficiency before the Appellate Division. (P.28)

1998 Decision and Order of the Appellate Division was denied by the New York Court of Appeals on December 29, 1998. *People v. McCreary*, 92 N.Y.2d 1035 (1998).

McCreary then brought the instant petition for a writ of habeas corpus, dated March 8, 1999. Although McCreary's petition asserts four separate grounds for relief, the Court perceives six distinct grounds:[11] (1) Petitioner's right to confront the witnesses against him was violated throughout the trial when the prosecutor and police witnesses referred to statements made by Andrew Oliver, Petitioner's brother and a non-testifying co-defendant; (2) the County Court's erroneous jury instructions regarding reasonable doubt violated Petitioner's rights to due process and to a jury trial; (2a) the County Court's erroneous jury instructions as to the elements of the crimes with which Petitioner was charged violated Petitioner's rights to due process and to a jury trial;[12] (3) Petitioner was deprived of the effective assistance of counsel;[13] (4) Petitioner was deprived of his right to counsel when the County Court failed to make a searching inquiry before allowing him to proceed *pro se* (4a) Petitioner was deprived of his right to counsel when the County Court refused to grant Petitioner's motion for reassignment of counsel and did not inquire whether he was proceeding pro se at

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[11]To avoid confusion, the Court will not renumber the four grounds asserted in the petition. With respect to the additional grounds for relief perceived by the Court, such grounds will be labeled: "Claim 2a" and "Claim 4a," respectively.

[12]This ground for relief was amended to its current form by stipulation dated July 2, 1999.

[13]All of Petitioner's ineffective assistance of counsel claims are addressed infra at Part II.E., regardless of where they appear in his current submissions.

trial.[14]

DISCUSSION

I. Exhaustion

As a prerequisite to federal habeas corpus review, a petitioner must exhaust his or her available state remedies. *See* 28 U.S.C. § 2254(b) and (c) (1996); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Jones v. Vacco*, 126 F.3d 408, 413 (2d Cir. 1997); *Dorsey v. Kelly*, 112 F.3d 50, 52 (2d Cir. 1997); *Daye v. Attorney General of New York*, 696 F.2d 186, 190 (2d Cir. 1982) (en banc). Premised on the principles of comity, the exhaustion doctrine assures "respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions" and "increase[es] the likelihood that the factual allegations necessary to a resolution of the claim will have been fully developed in state court, making federal habeas review more expeditious." *Daye*, 696 F.2d at 191. Although the writ of habeas corpus provides a remedy for imprisonment in violation of federal law, *see id.*, state courts, as well as federal courts, are charged with protecting a criminal defendant's federal rights, and the exhaustion doctrine requires that state courts "be given the opportunity to consider and correct any violations of federal law." *Jones*, 126 F.3d at 413.

To satisfy the exhaustion doctrine, a habeas corpus petitioner must meet a two-prong test. First, the petitioner must "fairly present" his or her federal claim to the highest state court

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[14]In light of this Court's recommendation on the disposition of Claim 4, the Court need not address whether failure to inquire into whether Petitioner was to proceed *pro se* at trial constituted error.

from which a decision can be rendered. *Dave*, 696 F.2d at 190-191 n.3. A claim is "fairly presented" if the state courts are informed of "both the factual and the legal premises of the claim [asserted] in federal court." *Id.* at 191. In particular, the same material factual allegations asserted in the federal habeas corpus petition must have been brought before the state court, in order to provide the state court with "a fair opportunity to pass upon [the] federal claim." *Id.* Additionally, "the petitioner must have placed before the state court essentially the same legal doctrine [asserted] in [the] federal petition." *Id.* at 192. A petitioner must alert a state court "to the fact that the [prisoner is] asserting claims under the United States Constitution" by clearly stating so. *Duncan v. Henry*, 513 U.S. 364, 365-66, *reh'g denied*, 514 U.S. 1032 (1995). A petitioner need not cite "book and verse" of the federal constitution. *Picard*, 404 U.S. at 278. Rather, the Second Circuit has stated, a petitioner can satisfy the prong requiring that the petitioner fairly present the issue by: (a) relying on pertinent federal cases employing constitutional analysis; (b) relying on state cases employing constitutional analysis in like fact situations; (c) asserting the claim in terms so particular as to call to mind a specific right protected by the Constitution; or (d) alleging a pattern of facts that is well within the mainstream of constitutional litigation. *See Daye*, 696 F.2d at 194.

Second, "having presented his federal constitutional claim to an appropriate state court, and having been denied relief, the petitioner must have utilized all available mechanisms to secure [state] appellate review of the denial of that claim," either by direct appeal or collateral attack. *Klein v. Harris*, 667 F.2d 274, 282 (2d Cir. 1981) (citation omitted); *see also Nelson v. Walker*, No. CV-94-1702, 1996 WL 148321, at *5 (E.D.N.Y. Mar.20, 1996), *aff'd,* 121 F.3d 828 (2d Cir. 1997). Thus, "even if a claim is not raised at trial or on direct appeal, a claim pursued throughout a full

round of state post-conviction proceedings is exhausted," *Garrett v. Garvin*, No. 97-CV-2495, 1998 WL 812589, at *1 (E.D.N.Y. Apr. 20, 1998) (citations omitted).

Applying the above principles to the instant case, it is clear that McCreary has exhausted all of the claims he now pursues. Although Respondent contends that Claim 2a has not been exhausted because Petitioner failed to fairly present the issue to the New York State courts (R.38-39), the argument fails because Petitioner asserted the claim in terms which call to mind a specific right protected by the Constitution and alleged a pattern of facts well within the mainstream of constitutional litigation. *See Daye*, 696 F.2d at 194. As articulated in his brief to the Appellate Division, McCreary alleged that the County Court's charge on the elements of the crimes prevented the jury from fairly deliberating over his guilt or innocence (Brief for Defendant-Appellant at 56, *People v. McCreary*, 253 A.D.2d 894 (2d Dep't 1998)) and that the charge "effectively directed a verdict for the People." (*Id.* at 59) McCreary's second letter to the Court of Appeals (following the Appellate Division's second Decision and Order) sought review "of all the other issues raised in the brief" (Letter to Judge of the Court of Appeals from Judah Serfaty, dated November 2, 1998), using language held sufficient to fairly present the claims to the Court of Appeals. *See Davis v. Strack*, 270 F.3d 111, 122-23 (2d Cir. 2001). Accordingly, having articulated this claim in language calling to mind federal due process rights and alleging a fact pattern well within the mainstream of such litigation, Petitioner has exhausted his state remedies with respect to claims of due process error arising out of the County Court's allegedly erroneous charge on the elements of the crimes.

Before reaching the merits of McCreary's claims, it is important to address one argument made by the Respondent. With

the exception of Claim 3, Respondent argues that all of McCreary's claims are procedurally barred based on the decision of the Appellate Division, which stated that each of the claims were "either unreserved for appellate review or without merit." *People v. McCreary*, 253 A.D.2d 894, 895 (2d Dep't 1998). Respondent states that because the State fully argued that McCreary had failed to preserve these claims, it should be assumed that the Appellate Division's decision rested on independent state procedural grounds.

However, in *Fama v. Commissioner of Correctional Services*, 235 F.3d 804 (2d Cir. 2000), the Court stated that "[i]n order for federal review to be barred, 'The state court must actually have relied on the procedural bar as an independent basis for its disposition of the case," and that "[b]ecause it can be 'difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing reference,' such reliance on state law must be 'clear from the face of the opinion." *Id.* at 809 (citations omitted). The Court went on to hold that "when a state court uses language such as '[t]he defendant's remaining contentions are either unreserved for appellate review or without merit,' the validity of the claim is preserved and is subject to federal review." *Id.* at 810.

Therefore, in the instant case, where the language used by the appellate court is almost identical to that at issue in *Fama*, McCreary's claims are indeed preserved and subject to federal habeas review on their merits.

II. The Merits of Petitioner's Claims

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a habeas petition shall not be granted with respect to

any claim that was adjudicated on the merits in State court proceeding unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (2001). Further, "a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Each of Petitioner's claims will be examined under these standards.

B. Claim 1: Alleged Confrontation Clause Violations

Petitioner first claims that his Sixth Amendment Confrontation Clause rights were violated when the prosecutor and the prosecution's witnesses referred to statements made by Andrew Oliver, Petitioner's brother and a non-testifying co-defendant. (P.30) Specifically, Petitioner contests the propriety of remarks by the prosecutor that suggested Petitioner's arrest followed police interviews with Andrew and the detectives' testimony linking the discussions with Andrew to Petitioner's confession.

The Confrontation Clause prohibits the admission into evidence of a non-testifying codefendant's confession, which incriminates the defendant, even where the trial court issues a

curative instruction. *See Bruton v. United States*, 391 U.S. 123. 126 (1968). Although *Bruton* arose in the context of a joint trial, the basic right articulated in *Bruton* has since been expanded to include references to statements made by a non-testifying co-defendant who earlier entered a plea. *See Mason v, Scully*, 16 F.3d 38, 42-44 (2d Cir. 1994); *Galvin v. Kelly*, 79 F. Supp. 2d 265, 275 (W.D.N.Y. 2000). However, where the evidence of an incriminatory out-of-court confession is offered for a non-hearsay purpose, it is admissible when accompanied by a limiting instruction. *See Tennessee v. Street*, 471 U.S. 409, 417 (1985). Confrontation Clause errors, as "trial errors," are subject to harmless error analysis, and such errors are considered harmless where the error "did not have a 'substantial and injurious effect or influence in determining the jury's verdict." *Ruiz v. Kuhlmann*, 2001 WL 579788, *8 (E.D.N.Y. May 30, 2001) (citations and internal quotation marks omitted).

"A Bruton violation... occurs only when the statement is both 'clearly inculpatory' of the defendant and 'vitally important' to the prosecution's case." *United States v. Slocum*, 695 F.2d 650, 655 (2d Cir.1982) (citations and internal quotation marks omitted); *see Bruton*, 391 U.S. at 135-37. While "[t]o implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit," *Mason*, 16 F.3d at 42-43 (citation omitted), the introduction of a reference to a non-testifying accomplice's out-of-court statement must result in the "clear" or "plain" implication that creates a "necessary inference" that the defendant is culpable. *Id.* at 43-44.

* * *

Petitioner contends that one of the prosecutor's remarks during his opening statement revealed that "discussions" with Andrew provided inculpatory information to prompt Petitioner's

arrest. (P.31-32)[15] In fact, the prosecutor's remarks indicate that Petitioner was arrested after discussions with Jenny, Andrew, and other members of the McCreary household. While these statements as a whole certainly have an inculpatory effect, they do not create the "necessary inference," Mason, 16 F.3d at 44, that it was Andrew's statements that supported the police action. Assuming these references were somehow "vitally important" to the prosecution's case, the references to discussions with multiple witnesses clouds the connection between any statements attributable to Andrew and Petitioner's guilt. The jury was made aware during the prosecutor's opening remarks that Jenny had provided incriminating evidence against McCreary but were given no indication as to what Andrew might have said. The remarks objected to by Petitioner reveal only that the decision to make an arrest followed an investigation which included interviews of Jenny, Andrew, and other members of the McCreary household. Such collective references do not support the inference that Andrew clearly implicated Petitioner in his statements to the police.

Petitioner also complains of instances in which the prosecution elicited testimony from various detectives wherein the detectives describe their efforts to induce McCreary to provide a confession. As an example, Petitioner objects to the following testimony urging that it compels the conclusion that Andrew implicated the Petitioner:

> Det. Towner: After that, I had a conversation with Mr. [Isaac] McCreary. I told Mr. McCreary that we had his brother in custody in the homicide squad, a fellow named [Andrew] Oliver. Another woman was in the homicide

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[15]The transcript of the statements is appended hereto.

> squad. She was assisting the investigation. Her name was Jenny.
>
> That they were telling us what happened, what went on in the house in Freeport, you know. I told him there was no reason to lie about it. They were giving us all the information and he might as well tell us what his part in this incident was.

(T. 1137) Similarly, Detective Blum testified that after he told McCreary that Evelyn, Jenny, and Andrew were in the other room talking to detectives and telling the truth, McCreary then confessed to accidentally shooting David. (T. 95 9-60) Contrary to Petitioner's position, the statements relating that Andrew, Jenny, and others were "talking," telling the "truth," or telling "the story," and that the police knew "what happened there," standing alone, carry insufficient incriminatory effect to implicate Petitioner's Sixth Amendment confrontation rights. *See Slocum*, 695 F.2d at 655. After all, there is no indication that Andrew was "talking" about anyone's participation but his own, nor is it clear from these references that he had even fully admitted his own involvement in the crime. Absent additional testimony as to what Andrew actually said, a jury could not reasonably infer that Andrew had implicated Petitioner. This is particularly true where the inclusion of Jenny in each of these references permitted the jury to conclude that she was the one who actually connected Petitioner to the crime. Nor could a reasonable jury infer Petitioner's guilt from the police statement that they had already found out "what happened," what the story was, or what went down. *See Black v. Walker*, 2000 WL 461106, at *7 (W.D.N.Y. April 14, 2000) (recognizing common police interrogation technique to tell a suspect that police have incriminating evidence when in fact they do not).

In its summation, the government never asked the jury to infer that Andrew had implicated Petitioner, rather the government argued that McCreary's decision to give an oral confession was voluntary, as it came on the heels of his learning that others were talking. How much and what was said by the others, particularly Andrew, was never revealed to McCreary or the jury. Moreover, such references are independently admissible under *Tennessee v. Street*, 471 U.S. 409 (1985), for the purpose of demonstrating the voluntariness of McCreary's confession. The Court makes it clear that Confrontation Clause concerns are not implicated when co-defendant statements are admitted for non-hearsay purposes. Although distinguishable from this case in that Andrew's statement was never actually admitted, obviating the need for any limiting instruction, this decision supports the conclusion that a generalized reference to other interviews for the non-hearsay purpose of explaining why a defendant confessed does not violate the Confrontation Clause.

In the final analysis, for every reference to Andrew's statements that Petitioner contends is impermissible, there is a simultaneous reference to a statement made to the police by either Jenny, Evelyn, or some "other person." The implication of Petitioner by Andrew's statements is so clouded by the references to statements of Jenny, Evelyn, or some "other person" as to negate any "necessary inference" of Petitioner's culpability. *See Mason*, 16 F.3d at 44. Andrew was certainly not the "only lead" the police had that connected Petitioner to the crimes, *id.* at 44; therefore, the instant case falls within the Fifth Circuit's decision in *Foy v. Donnelly*, 959 F.2d 1307 (5th Cir. 1992), where (as here) other police work focused the criminal investigation on the defendant.

If any error had occurred, however, violations of the Confrontation Clause are subject to harmless error analysis, where

"[t]he strength of the prosecution's case is probably the single most critical factor in determining whether error was harmless." *Ruiz*, 2001 WL 579788, at *8 (internal quotations and citations omitted). Here, when viewed in a light most favorable to the prosecution, the jury was presented facts from which the jury could have found McCreary guilty beyond a reasonable doubt. Not only did Petitioner make oral and written statements to the police in which he admitted his participation in the crimes, but two witnesses also testified that they saw Petitioner enter the victim's house (one saw him with a gun), that they both heard gunshots a few minutes later, and that Petitioner had told them he intended on scaring the victim into repaying a debt. Petitioner's friend Jenny also testified against him, saying that Petitioner had admitted he was at the scene of the crime the evening it occurred and that she had given Petitioner the key he used to open the apartment door. Petitioner also was able to identify a music tape found in David's apartment and provided the police with a layout of the crime scene which correlated with the forensic evidence. (T.1614)

The AEDPA directs this Court to defer to the state court's determination, provided that such a determination was neither "contrary to," nor constituted an "unreasonable application" of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *see also Glover v. Portuondo*, No. 96 Civ. 7616, 1999 WL 349936, at *4 (S.D.N.Y. May 28, 1999) (collecting cases);, No. 98 Civ. 580, 1998 WL 765180, at *3 (S.D.N.Y. Nov. 2, 1998). Such conduct falls within permissible boundaries set forth by Bruton and its progeny.

Accordingly, the undersigned recommends that Petitioner's application for writ of habeas corpus, inasmuch as it is based on Claim 1, be denied.

C. Claim 2: Allegedly Improper Jury Instructions Deprived Petitioner of His Due Process Rights (The "Reasonable Doubt" Charge)

Petitioner contends that the County Court's reasonable doubt jury instruction misstated the People's burden of proof when the trial judge announced that a reasonable doubt must be "really serious." Petitioner further contends that this error was of such magnitude that no objection was required, and that even if such an objection is required, defense counsel's failure to object supports an ineffective assistance claim. (P.43) Because the Court finds the jury charge did not violate Petitioner's constitutional rights, the Court need not address arguments related to defense counsel's failure to object or the futility of objection.[16]

The Supreme Court has long held that "the Due Process Clause requires the state in criminal prosecutions to prove guilt beyond a reasonable doubt." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (citing *In re Winship*, 397 U.S. 358 (1970)). The Supreme Court has also held that while the Constitution requires the application of this standard, it does not "prohibit[] trial courts from defining reasonable doubt nor require[] them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1,6(1994); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

However, if the trial court chooses to define "a reasonable doubt" for a jury, and its instructions are later challenged, the review of the challenged language is guided by several well-settled principles. First, although defendants often challenge individual

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[16]Petitioner's ineffective assistance of counsel claims are considered infra Part II.E.

words or phrases of a particular charge, "the challenged instructions must be viewed in context, not only with respect to the overall charge, but also with respect to the entire trial record," *Gaines v. Kelly*, 202 F.3d 598, 606 (2d Cir. 2000). That is, the charge must "correctly conve[y] the concept of reasonable doubt" when "taken as a whole." *Victor*, 511 U.S. at S (citation and quotation marks omitted); *see also Cupp*, 414 U.S. at 146-47 ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."); *Chalmers v. Mitchell*, 73 F.3d 1262, 1267 (2d Cir, 1996) ("Sometimes, erroneous portions of the jury instructions are offset when considered in context or explained by the trial court in later sections of the instruction. Other times, a seemingly innocuous incorrect statement becomes extremely damaging when coupled with other sections of the jury instructions or with improper conduct by counsel during the trial.") (citations omitted).

Second, the Court must inquire into (a) whether the challenged instruction shifted the burden of proof at trial and (b) whether the instruction raised the quantum of doubt necessary to acquit. *Chalmers*, 73 F.3d at 1267; *see also Vargas v. Keane*, 86 F.3d 1273, 1276 (2d Cir. 1996) ("A jury instruction that permits conviction on a lesser standard--by shifting the burden of proof from the prosecution to the defendant, or by suggesting that a higher degree of doubt than 'reasonable' doubt is necessary for acquittal--is constitutionally deficient.").

Third, the Court must "assess only the charge, taken as a whole, in order to determine whether there is a reasonable likelihood that the jury misinterpreted the reasonable doubt instruction. . . ." *United States v. Doyle*, 130 F.3d 523, 536 (2d Cir. 1997) (second emphasis added); *see also Estelle v. McGuire*, 502 U.S. 62, 72 (1991) ("[W]e inquire 'whether there is a

reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.").

Finally, review of a reasonable doubt jury instruction is not susceptible to harmless error analysis. *See Sullivan*, 508 U.S. at 278-82; *Doyle*, 130 F.3d at 536. Accordingly, the Court reviews the challenged instruction in context of the whole charge for whether there is a "reasonable likelihood" that the jury "understood the instruction to overstate the degree of doubt necessary for acquittal or to shift the burden of proof away from the prosecution." *Vargas*, 86 F.3dat 1281.

* * *

Petitioner argues that the County Court's instruction that a reasonable doubt must be "really serious" reduced the People's burden of proof by ascribing a quantum of weightiness that would be needed to acquit. Specifically, Petitioner alleges that the term "serious" refers to the "ampleness and abundance of doubt" required to acquit, not to the grounding of that doubt on the presence or absence of evidence. (P.47) Petitioner concludes, therefore, that the instruction diminished the People's burden and shifted that burden onto the Defendant. (P.4 8)

Petitioner reasons that, unlike language found in *Victor*, 511 U.S. 1, the language challenged here was not linked to language pertaining to the basis of the doubt. (P.48) Indeed, Petitioner is correct to state that "the sentence in which [the 'really serious doubt' language is] contained makes no reference to speculative doubts, and. . . the terms appear in a paragraph separate from the earlier instruction." (P.48) However, the sentence immediately preceding the allegedly offensive language is devoted entirely to discussing the materiality or tangibility of the doubt by contrasting a reasonable doubt with "[a] vague conjecture, a vague doubt, a capricious or speculative doubt, . . ." (T. 1700) Moreover, the

Court also went on to restate its definition of a reasonable doubt in language not considered objectionable by Petitioner:

> The doubt to be a reasonable one must, therefore, arise because of the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case.
>
> I therefore repeat and emphasize that a doubt of Defendant's guilt to be a reasonable doubt, must arise either from the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case.

(T. 1702).

Petitioner also reasons that the modifiers "really" and "serious" could only be understood together to connote a heightened degree of weightiness: "It would be senseless to require a really unimaginary doubt or a doubt based on some evidence really in existence or really not in existence." (P.49) Such an argument, relying on the fine dissection of language read in isolation, is an attractive one, but it requires the language of the charge to be "read separately" (P.50) instead of as a whole. *See Victor*, 511 U.S. at 6; *see also Cupp*, 414 U.S. at 146-47.

Finally, Petitioner adds that the court's charge on "groundless doubts" was also incorrect (P.49) because the modifiers "vague" and "uncertain" conflict with a reasonable doubt in the sense that reasonable doubts can be vague and need not be certain and because the modifier "arbitrary" could lead a rational jury to preclude consideration of doubts they raised on their own. (P.50) Again, making such arguments requires Petitioner to set

aside controlling authority (mandating that a reviewing habeas court consider the charge as a whole) and consider potentially prejudicial words in isolation.

Accordingly, the undersigned recommends that Petitioner's application for writ of habeas corpus, inasmuch as it is based on Claim 2, be denied.

D. Claim 2a: Allegedly Improper Jury Instructions Deprived Petitioner of His Due Process Rights (The Charge on Elements of the Crimes)

Petitioner claims that the County Court' s jury instructions on the various elements of the crimes with which he was charged prevented the jury from fairly deliberating his guilt or innocence. (P.50) To succeed on such a claim in the context of seeking federal habeas relief, a "petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by federal law." *Davis*, 270 F.3d at 123 (quoting *Casillas v. Scully*, 769 F.2d 60, 63 (2d Cir. 1985) and collecting cases). While an error of state law in and of itself may not support federal habeas corpus relief, the error may give rise to a due process violation. *See Davis*, 270 F.3d at 123. In order to grant habeas relief on such grounds, the Court must answer the following three questions affirmatively in favor of Petitioner. *See Davis*, 270 F.3d at 124. First, was the charge erroneous under New York law? Second, did the error "so infect[] the entire trial that the resulting conviction violates due process"? *Cupp*, 414 U.S. at 147. Third, was the error "of such a nature that it is remediable by habeas corpus, given the limitations prescribed by 28 U.S.C. § 2254(d)"? *Davis*, 270 F.3d at 124.

* * *

With respect to the County Court's burglary charge,

Petitioner contends that in spite of the prosecution's theory that Petitioner unlawfully entered the cottage, the judge charged the jury on alternative elements of burglary--that burglary could be established if the defendant "unlawfully entered or remained." (P.S 1) However, when asked to read the elements of the two burglary charges later by the jury, in the last instructions the jury heard, the judge did not refer to the "remaining" language objected to by Petitioner (T. 1826-36)[17]

Under New York law, it is not error for the judge to charge on both theories of "unlawfully entering or remaining" where the prosecution proceeded on a single theory and where no reasonable view of the evidence would lead to the conclusion that the defendant formed the intent to commit a crime after an unlawful entry. *People v. Fenderson*, 203 A.D.2d 585, 586 (2d Dep't 1994). Respondent's distinction of *People v. Gaines*, 74 N.Y.2d 358 (1989), on which Petitioner relies, is persuasive. In *Gaines*, the jury focused on the significance of when the defendant had formed criminal intent, "in the correct belief that it should be determinative of whether defendant had committed a trespass or a burglary." *Gaines*, 74 N.Y.2d at 363. Under the circumstances presented in *Gaines*, it was likely that a jury could misunderstand the charge as read to include "unlawfully entering or remaining" because the language could be interpreted to mean that under the "remaining" theory no intent would be necessary at the time of the legal entry under a license. Here, however, if any criminal intent had been formed, it had been formed prior to entering David's cottage; therefore, it is unlikely the jury misunderstood the charge. *Cf. Gaines*, 74 N.Y.2d at 363 ("The jury could have concluded from

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[17]Petitioner's allegation that the last instruction charged only "unlawful remaining" (P.51) is not supported by the record. (T.1829)

defendant's testimony that he intended no crime when he broke into the building."); *People v. Roberts*, 162 A.D.2d 729, 730-32 (2d Dep't 1990). Accordingly, having determined that the jury charge was not erroneous under state law, the Court need not resolve whether the resulting conviction violated Petitioner's due process rights.

With respect to the County Court's robbery charge, Petitioner claims the Court committed error when it neglected to include "forcible" in its summary of the elements of robbery, although the court articulated all the elements earlier in the charge. (P.51-52) Failure to include all the elements of the crimes charged when summarizing the charge, especially when such words "were the last words heard by the jury," constitutes error under New York law. *People v. Carnegie*, 74 A.D.2d 651 (2d Dep't 1980); *see also People v. Simpkins*, 174 A.D.2d 341 (1st Dep't 1991). However, because no reasonable view of the evidence would support a finding that his conviction was not based on the use of force (by threatening David at gunpoint), this instruction was not sufficiently harmful to render Petitioner's conviction in violation of his due process rights. *See Cupp*, 414 U.S. at 147.

With respect to the court's depraved mind murder charge, Petitioner contends the court mislead the jury into focusing on Petitioner's state of mind at the time the shot was fired instead of at the time he raised the gun and pointed it at David's head. (P.52) As Respondent correctly points out, Petitioner's contention that the prosecution had limited itself to the theory that Petitioner exhibited depraved indifference at the time he raised the gun and pointed it at David is not supported by the record as Petitioner alleges. (P.52; R.48) Accordingly, the County Court's charge cannot be said to have been error.

Accordingly, the undersigned recommends that Petitioner's application for writ of habeas corpus, inasmuch as it is based on Claim 2a, be denied,

E. Claim 3: Ineffective Assistance of Counsel

Petitioner claims that he was denied the effective assistance of counsel when defense counsel failed to object to references made to alleged *Bruton* violations, failed to object to the trial court's jury instructions, failed to adequately object to the disclosure that Petitioner was held in jail following his arrest, failed to properly request that the scope of Petitioner's contemplated testimony at trial be limited to the voluntariness of his confession, and failed to properly object to the prosecution's demonstration of a different firearm. (P.38-42, 54, 55 n.7)

"In order to prevail on an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was deficient and must then show that the deficiency caused actual prejudice to his defense." *Clark v. Stinson*, 214 F.3d 315, 321 (2d Cir. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong is satisfied by showing that the counsel's conduct "fell 'outside the wide range of professionally competent assistance." *Id.* at 321. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." *Strickland,* 466 U.S. at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1995)). The second prong is satisfied by showing that there is a "reasonable probability' that, but for the deficiency, 'the result of the proceeding would have been different." *Clark*, 214 F.3d at 321.

* * *

In support of McCreary's claim based on defense counsel's failure to object to alleged Bruton violations, he claims that defense counsel's conduct amounted to "delinquency" and could never be justified by a valid trial tactic. (P.38) In light of the Court's finding that no *Bruton* violations occurred, no ineffective assistance of counsel claim may be sustained. *See United States v. Hon*, 17 F.3d 21, 27 (2d Cir. 1994); *United States v. Caputo*, 808 F.2d 963, 967 (2d Cir. 1987); *Matos v. Miles*, 737 F. Supp. 220, 222-23 (S.D.N.Y. 1990). Accordingly, the Court need not address Petitioner's additional contentions that the result would have been different but for defense counsel's alleged error and that no reasonable trial tactic could sustain any failure to object.

McCreary also contends that defense counsel's failure to object to the jury instructions amounted to ineffective assistance. In support thereof, McCreary argues that he, an "active" defendant, should not be penalized for the allegedly deficient conduct of defense counsel because he was not privy to the conference in which defense counsel stated she had no objection to the charge. (P.46) Such a claim, however, is insufficient to rebut the "strong presumption" favoring finding defense counsel's conduct was objectively reasonable. Whether or not a defendant is an active participant in his defense has little bearing on the objective evaluation of his counsel's conduct. Moreover, assuming, *arguendo*, that defense counsel's conduct was objectively deficient, McCreary has not demonstrated that he suffered any prejudice from it. *See Strickland*, 466 U.S. at 693 ("Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense."). Indeed, in light of the finding that neither set of jury instructions violated McCreary's constitutional rights, McCreary cannot now claim he suffered any prejudice as a result. *See Hon*,

17 F.3d at 27; *Caputo*, 808 F.2d at 967; *Matos*, 737 F. Supp. at 222-23.

McCreary contends that defense counsel's failure to adequately object to the disclosure that Petitioner was held in jail also supports an ineffective assistance of counsel claim. (P.54) Specifically, on cross-examination of the defense witness Deborah McCreary, the prosecutor questioned the witness in a manner that revealed McCreary was in jail following his arrest. McCreary now complains that defense counsel inexcusably stated general objections that appear not to have apprised the trial court of the proper basis for the objection. (P.54) However, defense counsel did later move, albeit unsuccessfully, for a mistrial based on this cross-examination. (T.1496-97) Again, McCreary has failed to rebut the strong presumption that defense counsel's conduct fell within the wide range of permissible conduct. As Respondent points out, deciding not to object to such testimony is a common trial tactic used to avoid drawing the jury's attention to the potentially prejudicial testimony. Especially in light of the fact that defense counsel later moved for a mistrial based on the disclosures, the Court is hesitant to second-guess a strategic decision made by defense counsel without the benefit of hindsight.

Petitioner also argues that defense counsel failed to properly request that the scope of Petitioner's contemplated testimony at trial be limited to the voluntariness of his confession. (P.55 n.7) Respondent correctly contends that Petitioner's proposed limitation on the scope of his testimony was indefensible, *see Ohler v. United States*, S29 U.S. 753, 759 (2000) ("It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination.") (quoting *McGautha v. California*, 402 U.S. 183, 215 (1971)); *see also*

Brown v. United States, 356 U.S. 148, 154-56 (1958), the waiver "extends only to matters 'reasonably related' to the accused's testimony on direct examination," Wright & Gold, Federal Practice and Procedure § 6166 (1993). Petitioner's counsel correctly understood that calling Petitioner as a witness would expose him to cross-examination on all of the facts surrounding the confession, and not just those testified to by petitioner, and would further expose Petitioner to cross-examination on any matter bearing upon his credibility. Moreover, Petitioner's position is substantially weakened by his failure to support the necessary argument that but for defense counsel's failure the outcome of his trial would have been different.

Petitioner finally alleges that defense counsel's failure to properly object to the prosecution's gun demonstration denied him the effective assistance of counsel. (P.55) Specifically, Petitioner contends that the failure to object to the introduction of a different weapon and to allow the detective to drop it for the purpose of showing that it would not fire, amounted to ineffective assistance of counsel. (P.55) McCreary contends that defense counsel failed to properly object to the trial court's limiting instruction. (P.S 5-56) Respondent contends that two tactical strategies support a finding that defense counsel's failure to object was reasonable. First, Respondent contends that failing to object would be reasonable given the fact that McCreary's defense was that he was not involved in the shooting; therefore, crossexamination on this particular issue would not advance the defense. (In fact, vigorous crossexamination or objection on this issue could also have undermined the defense's theory.) Second, Respondent contends that it is possible that the demonstration could have benefitted (directly or by impeaching the state's witnesses) McCreary, had the hammer released when the gun was dropped by the detective. McCreary has, however, not attempted to rebut the strong

presumption that failure to object to the gun demonstration might be part of defense counsel's trial strategy.

With respect to the claims of error underlying McCreary's ineffective assistance of counsel claim, McCreary has also failed to do more than baldly argue that but for these alleged failings of defense counsel that the result would have been different. Accordingly, the undersigned recommends that Petitioner's application for writ of habeas corpus, inasmuch as it is based on Claim 3, be denied.

F. Claim 4: Alleged Violation of the Right to Counsel (Invalid Waiver)

Petitioner claims his federal constitutional rights were violated when the County Court failed to conduct a "searching inquiry" before allowing Petitioner to proceed pro se, yielding an invalid waiver of the Sixth Amendment right to counsel. (P.57)

The Sixth Amendment guarantees the right to counsel for a defendant in a criminal prosecution. *See* U.S. Const. amend VI; *United States v, Tracy*, 12 F.3d 1186, 1191 (2d Cir. 1993) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The Constitution also protects the right to proceed without the assistance of counsel, as long as the decision to do so "is made intelligently and knowingly. with full awareness of the right to counsel and the consequences of its waiver." *Id.* (citing *Faretta v. California*, 422 U.S. 806 (1975)). A criminal defendant is entitled to proceed pro se if he "knowingly, intentionally and unequivocally" waives his right to appointed counsel. *Johnstone v. Kelly*, 808 F. 2d 214, 216 (2d Cir. 1986) (emphasis supplied).

Whether a waiver of the right to counsel is made intelligently

and knowingly turns "on the particular facts and circumstances of the case, 'including the background, experience, and conduct of the accused." *Id.* (citing *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)) (quotation marks omitted). The *pro se* defendant need not possess the "understanding and skill of a lawyer" as long as he is able to make a "rational decision" and has been "made aware of the dangers and disadvantages of self-representation." *Id.* "Although there is no talismanic procedure to determine a valid waiver," *Torres v. United States*, 140 F.3d 392, 401 (2d Cir. 1998) (citing *Tracy*, 12 F.3d at 1194), "the record must establish that a defendant knew 'what he [was] doing and his choice [was] made with eyes open." *United States v. Hurtado*, 47 F.3d 577, 583 (2d Cir. 1995) (quoting *Faretta*, 422 U.S. at 835). A reviewing court "need not analyze the [trial] court's every word, so long as the record as a whole demonstrates that the defendant knowingly and intelligently waived [his] right to counsel." *Torres*, 140 F.3d at 401.

* * *

While it would be preferable to have a complete record of the proceedings before the County Court in order to facilitate this Court's review of the allegedly invalid waiver, the record is sufficiently clear to permit this Court to resolve this issue.

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Following the County Court's denial of Defendant's motion for reassignment of counsel in a written decision dated July 13, 1991, Defendant filed a second written motion to proceed *pro se*. (P.3) In its written decision on this motion, the County Court noted that in filing the second motion, Defendant was "renewing a previous application seeking the same relief subsequently withdrawn." (Decision and Order dated October 7, 1991). Although Petitioner could not provide this Court with a record of any in-court proceedings prior to October 24, 1991, the County Court's decision indicates that at a proceeding held prior to October 7th, the court had "fully advised the defendant of the risks he may incur

by so proceeding and directed the defendant's present attorney, Lori Golombeck, Esq., to stand by and assist. . ." *Id.*

At the suppression hearing which began on October 24th, the court, referring to the Petitioner's earlier flip-flop on the issue of self-representation, observed at the beginning of the hearing, "Keep in mind, too, that Ms. Golombek's client, the last we heard, was pro se," (H1:l0) At this hearing, however, Petitioner made no attempt to represent himself. In complete contradiction to Petitioner's claim that the record of the hearing is clear that Petitioner was representing himself, the record makes clear that Petitioner made no attempt to represent himself. He made no attempt to present argument on his own behalf or to examine any witnesses and did nothing to indicate that he was proceeding *pro se.* Instead, he permitted his attorney, Ms Golombeck, to fully proceed on his behalf. On the second day of the hearing, when the court inquired whether Petitioner was satisfied with Ms. Golombeck's representation, Petitioner indicated that he wished for her to continue his representation and that he was satisfied with her performance. (H 1:167-68) Thus, contrary to Petitioner's claim that he made it clear that he intended to represent himself, his conduct and statement to the court indicated that, notwithstanding his earlier application, he had once again abandoned his application to proceed *pro se*, choosing instead to proceed represented by counsel.

Finally, on the fifth and last day of the hearing, and after direct examination by Ms. Golombeck of the final defense witness, Petitioner requested permission to ask questions of this last witness. Responding to what the court perceived to be yet another reversal by Petitioner on the issue of self-representation, the court held the following colloquy on the record:

Ms. Golombeck: I have no further questions.

The Court: Anything else?

Ms. Golombeck: My client would like to ask some questions.

The Court: Now he decides to go pro se again?

Defendant Isaac McCreary: You said I was still pro se and that she can speak for me.

The Court: No, I didn't say that, You originally made an application and after I went through the whole business with you and told you how foolish I thought it was, I said, "You have the right to go pro se, but I would assign Ms. Golombeck to stand by,"

You said you wanted her to represent you. Now I am not going to have it both ways. Either you do it by yourself and get her advise or she does it for you. Now, I am not going to have you put another hat on in the middle of a hearing and say: Okay, this is what I want to do for this question. It is not going to be that way.

If you have a question you want to have asked, have your lawyer do it for you.

Defendant Isaac McCreary: I want to do it myself.

The Court: All right. Remember what I told you. You will be held to the same standard as a lawyer. If there is an

objection made and it is not asked properly, I have to rule on it.

Ask your questions.

(H3:32-33) It is clear that up to this point the court had properly concluded based upon the defendant's conduct and statement that he had abandoned any interest in self-representation. As evidence that the court was correct in its assessment, Ms. Golombeck, on the first day of trial, acknowledged that although the Petitioner had initially expressed the desire to proceed *pro se*, he had agreed to her representation not only for the hearing but for the trial as well. Counsel further acknowledged that Petitioner "never really wanted to go *pro se*." (T.2-6)

Following this colloquy, Petitioner asked a mere five questions after which the hearing was concluded. Thereafter, Petitioner never again asserted any interest in representing himself. Instead, on the first day of trial he asked for the appointment of new counsel and, when that was denied, he permitted Ms. Golombeck to fully conduct his defense.

The right to self-representation attaches only if it is asserted "clearly and unequivocally" *Faretta*, 422 U.S. at 8 19-20. Where a criminal defendant does not "clearly and unequivocally" assert the right to self-representation, the right has not attached. *Wilson v. Walker*, 204 F.3d 33, 37 (2d Cir. 2000) (citing *Faretta*, 422 U.S. at 835). "A criminal defendant is entitled to proceed *pro se* if he 'knowingly, voluntarily, and unequivocally' waives his right to appointed counsel." *Id.* (citing *Johnstone*, 808 F.2d at 216). Whether a defendant has invoked his right to self-representation is a question of fact. *See Fields v. Murray*, 49 F.3d 1024, 1032 (4th Cir. 1995); *see also Cain v. Peters*, 972 F.2d 748, 749-SO (7th

Cir. 1992). "Once asserted, the right to self representation may be waived through conduct indicating that one is vacillating on the issue, or has abandoned one's request altogether" *William v. Barlett,* 443 F.3d 95,100 (2d Cir. 1994). "A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." *Wilson*, 204 F,3d at 37 (quoting *Brown v. Wainwright*, 665 F.2d 607, 6 11(5th Cir. 1982)). Moreover, courts are instructed "to indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

Here, Petitioner's conduct leaves in serious doubt whether he ever effected the attachment of his right to self-representation by clearly and unequivocally asserting the right. His repeated vacillation on this point, his expression of satisfaction with his attorney, his cooperation with counsel, and his abandonment of any attempt to question witnesses or act in his own defense, as well as counsel's comments on the record, all support a finding that no right was asserted and, even if it was, it was subsequently waived.

Accordingly, the undersigned recommends that Petitioner's application for writ of habeas corpus, inasmuch as it is based on Claim 4, be denied.

G. Claim 4a: Alleged Violation of the Right to Counsel (Reassignment of Counsel)

Petitioner claims the County Court made two related errors in its consideration and rejection of Petitioner's request for reassignment of counsel, made on the eve of trial. First, Petitioner alleges error occurred when the County Court ruled on the motion without questioning Petitioner about his contentions. Second, Petitioner alleges that the ruling itself was erroneous. (P.65, R.68)

"The Second Circuit has long recognized that certain limits must be put on the reassignment of counsel 'lest the right be manipulated so as to obstruct orderly procedure in the courts, or to interfere with the fair administration of justice." *Crawford v. Keane*, No. 00 Civ. 6672, 2001 WL 913947, at *5 (S.D.N.Y. Aug. 14, 2001) (quoting *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981). "To obtain a substitution of counsel during trial, a defendant must show 'good cause, such as a conflict of interest, a complete breakdown in communication during trial, or an irreconcilable conflict which leads to an apparently unjust verdict." Id. (citations omitted); see also Schmidt, 105 F.3d at 89. "Where a defendant voices a 'seemingly substantial complaint about counsel, the court should inquire into the reason for the dissatisfaction." Crawford, at *5 (quoting *McKee*, 649 F.2d at 933). "If the failure of the court to conduct such an inquiry causes no harm to the petitioner, however, it cannot be the basis of granting a writ of habeas corpus." *Id.; see also Bradley v. Girdich*, No. 94-CV-3827, 1996 WL 1088344, *6 (E.D.N.Y. 1996) ("[W]here the reasons for substitution of counsel are either cured or insubstantial and the defendant received able representation, the failure to inquire is harmless.").

* * *

As an initial matter, the Court must first determine whether Petitioner's complaint about assigned counsel was "seemingly substantial," thereby warranting an inquiry by the County Court into the reason for Petitioner's dissatisfaction. Here, defense counsel alerted the County Court to a conflict of interest at the commencement of the trial and specified that Petitioner was not satisfied with her advice. (T.2) Defense counsel detailed the possible areas of such conflict by providing the County Court with background on disputes with her client over: the use of an

investigator, the issuance of a subpoena, and the number of her visits with Petitioner. (T.3-4) Defense counsel further stated that Petitioner wanted an adjournment and that there was a "very real problem of communication." (T.6-7) Having been alerted by defense counsel to problems in the attorney-client relationship, the County Court then properly inquired into the reason for Petitioner's dissatisfaction. When questioned by the court, defendant's entire statement was: "Your Honor, I've tried on a few occasions to have her taken off my case. I don't feel comfortable with her and we just can't seem to get anything together. And I have a very, very serious case. And I would ask you again to take her off my case, please. I don't mean to prolong this any longer than it has to be. That is not my motive." (T.8-9)

Merely "feel[ing] uncomfortable" with defense counsel and not being able "to get anything together" do not warrant the reassignment of counsel on the eve of trial, *see United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972); *Schmidt,* 105 F.3d at 89, nor do such comments (when unsubstantiated at the hearing by Petitioner) arise to the level of a "seemingly substantial" complaint, thereby not requiring further inquiry. Moreover such circumstances do not warrant the granting of habeas relief where there is no evidence of the denial resulting in an unjust verdict. Defense counsel provided Petitioner with competent and zealous representation, see supra II.E,, and Petitioner suffered no reversible harm by the County Court's denial of his request for new counsel.

Accordingly, the undersigned recommends that Petitioner's application for writ of habeas corpus, inasmuch as it is based on Claim 4a, be denied.

CONCLUSION

Accordingly, it is hereby recommended that Isaac McCreary's petition for a writ of habeas corpus be denied.

Any objections to this report must be filed with the Clerk of the Court within 10 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal this Court's Report and Recommendation. *See* 28 U.S.C. 636(b)(l); Fed. R. Civ. P. 6(a), 6(e), 72; *Frank v. Johnson,* 968 F.2d 298 (2d Cir. 1992); *Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

SO ORDERED.

Dated: Central Islip, New York
June 18, 2002

/S/
ARLENE ROSARIO LINDSAY
United States Magistrate Judge

Appendix

1. The prosecution's opening statement included the following:

The People: But as the questioning process continues, Jenny admits to the detectives that she held back information and that Jenny gives to them. They go out and on May 3rd, 1991, they arrest Andrew Oliver McCreary. Andrew Oliver McCreary is arrested outside his premises in Freeport at 100 Wallace Avenue, on the early morning of May 3rd, 1991.

He is taken into the homicide squad for questioning.

As a result of the information that they learn - - excuse me. Withdrawn.

Following the discussions with Andrew Oliver McCreary, and with different members of the McCreary household, police cars are then dispatched to the Dunkin' Donuts in Roslyn,. . . Isaac McCreary, as he's coming out of the Dunkin' Donuts in Roslyn, he is arrested by members of the homicide squad.

(T.618-619).

2. The prosecution elicited the following testimony:

Det. Towner: After that, I had a conversation with Mr. [Isaac] McCreary. I told Mr. McCreary that we had his brother in custody in the homicide squad, a fellow named [Andrew] Oliver. Another woman was in the homicide squad. She was assisting the investigation. Her name was Jenny.

That they were telling us what happened, what went on in the house in Freeport, you know. I told him there was no reason to lie about it. They were giving us all the information and he might as well tell us what his part in this incident was.

(T.1 137).

The People: By the way, while you were en route from Dunkin'

Donuts, did you make any stops along the way?

Det. Towner: Yes, we did make a stop.

I told Detective Brusa to find a telephone and pull over and so that I could telephone the homicide squad. I was aware at that time that Jenny was giving them information in the homicide squad. I was aware that his brother, the Defendant's brother, here, was giving information.

I wanted to let them know that we had in this case, what he's admitted to us up to this point. And ask them if they had any more information I could question Mr. McCreary with over here to, you know, maybe elicit a little more of the facts as to what went on that day.

(T.I 141—1142).

The People: Then, what happens is that the detectives say to him, "Look, Isaac, I want to tell you something. Your brother is under arrest. He is in the homicide squad. He's talking to us. Jenny is at the homicide squad. She's cooperating with the investigation. And we know what happened there."

(T.6 19-620).

Det. Blum: It was after the pedigree and discussion about the girlfriend, I said to him, "Look, Isaac, we have been working all day and all night." I said, "Your brother is here. He's under arrest. He's in the other

room and he's talking to the detectives and he's telling the truth." I said, "Jenny is here. She is telling the truth. Evelyn is here and she is telling the truth."

I said, "Now, I would like you to have the opportunity to tell me what happened."

(T.959).

Det. Lane: Detective Blum had indicated to Isaac McCreary that both [Andrew] Oliver and Jenny are in police headquarters and that both of them are telling the story of what happened already.

(T. 1385).

Det. Towner: Mr. McCreary originally, in the beginning of the conversation, denied that he was at the house in Freeport where the shooting took place. Shortly after, I went into the fact that his brother was under arrest for the incident, in the homicide squad, and cooperating.

And that this other person that was known to them was also cooperating and separately giving us the information as to what had transpired in Freeport.

Isaac McCreary started giving me what I consider partial admissions. He placed himself at the location at that point. He said he did go over to the house in Freeport. He was going to go over to the house in Freeport to get money that was owed by this fellow to Jenny. The money was in the amount of 300,

about $350.

(T.1139-1140), and

Det. Brusa: We informed the Defendant that his brother had been arrested as well and that he was in the homicide squad talking to detectives, pertaining to this case, the burglary and the shooting of David Ramnath and we also indicated that his friend, Jenny, was present at the homicide squad, talking to the detectives there and providing information about what had occurred.

(T. 1336-37).